

## The German Constitutional Court's Lisbon Ruling: Legal and Political Science Perspectives

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ZERP-Diskussionspapier 1/2010

# The German Constitutional Court's Lisbon Ruling: Legal and Political Science Perspectives

Andreas Fischer-Lescano

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**ZENTRUM FÜR EUROPÄISCHE RECHTSPOLITIK**

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## Preface

The judgment of the German Constitutional Court on the Lisbon Treaty, handed down in June 2009, seems too important to be left to lawyers and/or Germans alone. On the other hand, its length and technical complexity are barriers to its understanding by a broader, even academic, public. The workshop on 25 September 2009 at the Bremen International Graduate School of Social Sciences (BIGSSS), from which the present discussion paper originated, sought to respond to this constellation. The format of the workshop was interdisciplinary and international. Discussants were invited to focus on aspects they were particularly concerned about. Our endeavour was not to arrive at some comprehensive, let alone uniform, evaluation, but to carry out a multi-dimensional exploration and debate of a ruling that is extremely contested in Germany.

We considered the workshop a success and therefore want to express our gratitude not just to those who delivered written statements but to all workshop participants: Michael Blauburger, Damian Chalmers, Marco Dani, Tatjana Evas, Björn Fleischer, Michelle Everson, Zoran Janevski, Fritz W. Scharpf, Waltraud Schelkle, Susanne K. Schmidt, Marcena Kloka, Rike Krämer, Tilman Krüger, Gesche Lange, Ulrike Liebert, Deborah Mabbett and Björn Schreinermacher. We are also grateful to BIGSSS for logistical and financial support. Finally, we thank Kolja Möller for extensive editorial support.

We hope that our contributions will stimulate readers' thinking about the specifics of different aspects of the GCC's Lisbon ruling and, starting from there, perhaps also more generally about the future of a democratic European Union – however this future might be imagined both in form and in content.

Bremen, January 2010

*Andreas Fischer-Lescano, Christian Joerges, Arndt Wonka*



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# A Few Thoughts on the Lisbon Judgment

*Damian Chalmers*

I have been asked to lay the ground for today so I will give my own potted understanding of the judgment, aware (partially at least!) of both the limits of packing 421 paragraphs of reasoning into five minutes, my ignorance of German constitutional law, and the dangers of working off a translation. Any restatement has, of course, to work off a legal context which, in this case, is a complaint about the reshaping of the EU institutional settlement. However, the great thing about legal texts is that they no longer belong to the authors but the readers! They thus raise new and, in this case, more interesting issues of which I shall mention three: the worrying development of a dualism of legal logic, the questioning of regulatory democracy, and the sacralisation of representative democracy. Before that, I must say what I understand by the judgment.

## 1. A Restatement of the Judgment

I shall not go through the judgment sequentially but rather bring together elements stated at different parts of the judgment that combine to bring together a four-step logic. This is partially done for coherence and communicability. It is also done because a criticism I have of much of the critique of *Brunner* was that it was hubristic and failed to pay attention to the balance and tensions internal to the reasoning of the GCC.

Step One: The GCC sets out a constitutional commitment to European integration, which it roots in Article 23 of the Basic Law. It is perhaps worth setting this as a starting point not simply to counter some of the hysterical characterisations of the judgment but also because, legally, this is the point of departure for the judgment. Without the GCC's understanding of Article 23, it would not be possible to ratify many elements of the EU institutional settlement.

This understanding has two important implications. First, it imposes a duty of openness to EU law on all German courts. This involves giving it precedence – a hierarchy of norms – in all but the most exceptional circumstances. Secondly, there is a *requirement* not an option on German political institutions to engage in European integration. European integration is not just normatively justifiable but imperative.

Step Two: The principle of democratic self-rule in Article 38 of the Basic Law is set out and explained. It provides for every citizen to elect the members of the *Bundestag* under principles of free and equal election. It also provides for

this body to be meaningful legislatively. Its powers cannot be substantially curtailed. This principle is rooted not just in Article 38 and the right to vote but the principles of human dignity (Article 1) and popular sovereignty (Article 20).

The GCC then sets out the relationship between this principle and Article 23, saying that the latter should take subject to this principle. This may be controversial to some but insofar as a relationship had to be established, it is worth thinking about the alternatives. If Article 23 was to be given precedence, there would be the establishment of a European *raison d'état* doctrine. Would we really want to go back to the C17? The Lisbon Treaty suggests not as even it commits itself to representative democracy. It is like arguing that EU law should prevail over national fundamental rights provisions. Would we want a Europe that commits torture?

Step Three: The GCC mediation of these principles. Two forms of review are established. Ultra-vires review to prevent the EU exceeding the powers conferred to it. This will be either when it does not act within these powers in a limited way or violates the subsidiarity provision. The second is identity review. This is where it violates central parts of a national constitutional identity even when acting within its powers by curtailing the role of the *Bundestag* by legislating in core areas other which the latter should have a monopoly. These are the State's monopoly of violence, fundamental elements of fiscal policy and the *Sozialstaat*, and culturally important fields, notably family, education and religious law.

Step Four: The Implications for Lisbon Treaty. The GCC, almost unnecessarily, indicates that it is suspicious of the EU's democratic credentials measured as a State. It points to the principle of degressive proportionality, the presence of nationality for determining the composition of the Commission and Council and the presence of only an inchoate European public. It then applies ultra-vires view to two fields where it feels the principle of conferral has been relaxed. Article 352 TFEU, the flexibility principle, and the simplified revision and bridging procedures which allow for procedures to be transformed into QMV without an IGC. In both, it seems there must be approval of both German parliamentary chambers.

## 2. The Dualism of the Judgment

Although the GCC suggests a unitary constitutional logic indicating (at para. 235) whereby German constitutional principles apply across all levels of government, this looks rather thin, however, and in practice a dualist logic is operating. There is the logic of Article 38 – to apply domestically – and the logic of Article 23 – a less legitimately thick logic both in its normative priority and its

ethical substance – which is to govern the operations (within their powers) of EU Institutions.

This raises a number of questions. The first and most obvious is why bother with the EU at all? If it is not that democratic, what is the justification for citizens accepting its laws? Thin analogies are made about preserving peace, but this is largely the role of NATO and the OSCE. The justification for the EU is surprisingly empty. The second is that it leads to a sacralisation of national democracy and abnegation of EU democracy. Leaving aside the former, this contrasts very unfavourably with the approach of the Czech Constitutional Court which states that its commitment to European integration lies in the basis of its being a ‘democratic law-based’ state and the same principles will apply across the board. There is a view of the GCC that what goes on in Europe is for Europe to decide, and that is profoundly troubling. Finally, there is the relationship between the different principles of legitimation. At base, the delimitation point is that anything within the five ‘sacred fields’ of constitutional identity is a matter for national parliaments. Leaving aside demarcation questions, they retain the entitlement to be interested and involved in other fields. Regulation, migration and equal opportunities – to take but three – all raise electorally explosive and politically sensitive matters. There are the formal arrangements for national parliaments to question EU legislation but looked at as a matter of political ethics and justification, what happens, for example, if a national parliament questions GMO regulation? Is it simply that we must go along with it to sustain the European *raison d’état*?

### **3. The Future of the Regulatory State**

It is ultimately not particularly fertile to look at *Die Linke* in centre-periphery terms. At heart, the judgment is about sustaining the place of representative institutions within a national constitutional democracy. Its central dynamic is about the relationship between majoritarian and non-majoritarian institutions, and the mood music is that in developing governmentality, public policy and regulatory reach insufficient attention has been paid to the place and importance of the former. It is thus also about thinking of constraints and curbs on the former.

The judgment is thin on this but it raises two important implications. The first is that in the development of the regulatory State, its institutions are always justified by the logic of exceptionalism. Non-majoritarian institutions are justified, variously to protect structurally disadvantaged minorities, enable temporal consistency, sustain collective goods that could not otherwise be realised, enable the participatory praxis of stakeholders, create a place for sustain-



ing expertise. None of these are arguments that apply across all areas of policy-making but rather to limited fields and all ask for particular privileges (e.g. reference to particular groups, particular forms of knowledge, the importance of a particular policy such as combating climate change or free trade). The judgment is a reminder that these are exceptional arguments and they can claim a normative place in debate but not a normative priority.

This comes out in the idea that the EU should be a limited project. It also comes out a little in the contingency of EU law. There should be some scepticism as to regulatory law. Yet because of the dualist logic described in 2, there is after 421 paragraphs very little on this. The more sensitive issues have been obscured around debates about political system-building.

#### **4. The Treasuring of Representative Democracy**

The final point begged by the judgment is what is so great about representative democracy. I would suggest there are three elements:

First, representative democracy conveys an idea of fairness and equality not present in other versions of democracy. Representative institutions have to be representative in terms of different societal groups and they are exercised on a basis of a single, indivisible being (constituent power). There is thus within them the Arendtian fiction of us as equals not just in having equal voice but also equal designation rather than as a stakeholder because of some division of labour. This feeds into Durheimian notions of mechanical solidarity, which are based on ideas of kinship and sameness (e.g. religion, ethnicity). This leads to ideas of communities of strangers bound not by interdependence but by collective myths. To be sure, there are dangers with this but it is this idea of solidarity that allows ideas of fairness beyond interdependence and of commitment to redistribution.

Secondly, representative democracy ties institutions to an idea of political community. There is the idea that they act on behalf of a political subject. This is not so strongly present with other forms of democracy, and it conveys the idea of politics as something that contextualises, limits, contains and justifies political institutions.

Thirdly, representative democracy ties its subjects to certain values. This is not so much in the praxis but in the idea of a community of strangers that extends beyond time and space. To justify that community and to generate affective ties, it must tell itself that it does good for its subjects and, importantly, that it is a community of good subjects.

It is precisely these features – no overarching vision of justice or welfare,

no stable sense of political community and no affective sense of value that is set out in Superego-ish terms – that are not possessed by the EU. Rather than manipulate it into a box that does not fit, it might be better to see that these are perennial constraints.

Yet many of these traits are counter-factuals operating largely at the symbolic level. They take no account of the symbols or values that are less well protected even symbolically (e.g. minorities and outsiders, ‘non-national’ visions of justice, or value systems or individuals that do not conform to the general good). They do not look at the highly uneven praxis of representative democracy, with its limited resources, corruptibility and short time cycles. They pay little attention to the relationship between government and legislature either in how the former can dominate the latter or in how little the latter constrains the former.

This is all worrisome. The GCC looks here as if it was looking at the wrong equation: Europe v representative democracy. A better one might have been representative democracy v other forms of democracy. Hopefully it will re-engage with this battle!



# Looking through Different Glasses at the Lisbon Treaty: The German Constitutional Court and the Czech Constitutional Court

Rike U. Krämer

## 1. Introduction

The Treaty of Lisbon was signed on 13 December 2007 and has still to enter into legal force, although its enactment was scheduled for the end of 2008. After the long-awaited signature of the Czech President Vaclav Klaus the enactment is now scheduled for the first of December. Nearly one year later than intended. This delay is mainly due to the constitutional courts in the member states of the European Union (EU). Particularly the referendum in Ireland was an Irish Supreme Court requirement. The enactment of the Treaty of Lisbon will change the day-to-day life in Brussels extensively. Accordingly, some citizens in the member states disapproved that this decision should only be taken by their parliaments. In some countries a referendum was demanded<sup>1</sup>. In others people were content with a ruling of the constitutional court regarding the constitutionality of the Treaty of Lisbon. Especially in Germany and in the Czech Republic this was the case.

In both countries the German Constitutional Court (GCC) and the Czech Constitutional Court (CCC) had a similar task. Yet, their outcomes differ. Both courts judged about the compatibility of the Lisbon Treaty with ‘their’ respective national constitution from a different perspective. The CCC started with a quite positive view regarding the European integration process, unlike the GCC which was more reluctant in finding positive aspects of the European multilevel-regime. Interestingly, the initial position in the two countries, when bringing the case to the courts, varied widely. In Germany the *Bundestag* and the *Bundesrat* voted with a high majority for the *German Act Approving the Treaty of Lisbon* and the accompanying laws to this act, in contrast to the situation in the Czech Republic. Here, the case was first brought to court before the parliament had actually voted on the ratification issue.<sup>2</sup> In the end, however,

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1 For example in Latvia the complainant required from the constitutional court a ruling in favour of a referendum. However, the Constitutional Court of the Republic of Latvia ruled in favour of the Lisbon Treaty, in their view a referendum was not required by the constitution. Furthermore, as is well-known, also the Irish finally endorsed the ratification of the Lisbon Treaty in their second referendum on 2 October this year.

2 Piotr Maciej Kaczyński, Sebastian Kurpas, and Peadar ó Broin, ‘Ratification of the

both courts unanimously<sup>3</sup> decided this issue affirmatively.

In this paper, the first judgement of the CCC<sup>4</sup> and the GCC judgement will be compared, especially those parts that deal with the different views of the courts regarding the European integration process. It is argued below that the CCC understanding of sovereignty and judicial control does unlike the GCC judgement justice to this process. The paper starts with the judgement of the CCC because this decision ‘drew a strong and explicit inspiration from judgments [Maastricht and Solange II] of the German Federal Constitutional Court’<sup>5</sup>. Also, this ruling came out first.

## 2. The Ruling of the Czech Constitutional Court

The first judgement of the CCC was unanimously adopted on 26 November 2008. In the operative part of the judgement it is stated ‘that the Treaty of Lisbon [...] and the Charter of Fundamental Rights of the European Union are not inconsistent with the constitutional order’<sup>6</sup>. The first ruling was not the final say of the court. The court only reviewed those provisions that were contested by the parties, not the whole treaty. Thus, the ruling outlined below is no final proof of compatibility with the Czech constitutional order. However, in the second judgement, adopted on 3 November 2009, the CCC ruled unanimously that the Treaty of Lisbon, and the ratification of it, does not contravene the constitutional order.

For the question of whether a treaty is in conformity with the constitution, special review ability is laid down in Art. 87 (2) of the Czech constitution.<sup>7</sup> In accordance with this procedure, the court’s review primarily focused on three

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Lisbon Treaty: Ireland is not the only problem’, European Policy Institutes Network Working Paper No. 18 (2008), 1-12, 7 ff.

3 The GCC judgement was ruled unanimously as regards the result; by seven votes to one as regards the reasoning.

4 The paper also includes some remarks about the second judgement adopted on 3 November 2009 file no. Pl. ÚS 29/09. Unfortunately, the English translation of the judgement was not available before this paper was handed in.

5 Petr Bříza, ‘The Czech Republic: The Constitutional Court on the Lisbon Treaty Decision of 26 November 2008’, *European Constitutional Law Review* (2009), 143-164, 164.

6 Para 218 of the judgement Pl. ÚS 19/08. The English version of the judgement is available at: <[http://angl.concourt.cz/angl\\_verze/doc/pl-19-08.php](http://angl.concourt.cz/angl_verze/doc/pl-19-08.php)>.

7 Prior to the ratification of a treaty under Article 10a or Article 49, the Constitutional Court shall further have jurisdiction to decide concerning the treaty’s conformity with the constitutional order. A treaty may not be ratified prior to the Constitutional Court giving judgement.

Articles of the constitution, namely Article 1 (1)<sup>8</sup>, Article 10a (1)<sup>9</sup>, and Article 9 paras 2 and 3<sup>10</sup>. There are three parts of the judgement in which the court took up a position on the integration process. Firstly the court deals with the question of gaining or losing sovereignty by being part of the European Union (a). Secondly the question regarding the barriers of competence transfer is considered (b). Lastly the competence of ultimate judicial control is outlined (c).

*a) Sovereignty*

The part of the judgement that deals with the question whether the Czech Republic loses its status as a sovereign state through the ratification of the Treaty of Lisbon starts with the experiment to describe sovereignty. The court first arrived at the conclusion that

it is also possible to observe in a sovereign the freedom to restrict itself by the legal order or by freely accepted international obligations, in other words, the ability to regulate its competences (Jellinek, J. op. cit., p. 524). We can conclude from this that the possibility to create this free will that a state has to repeatedly amend a particular competence is not a sign of a sovereign's inadequacy, but of its full sovereignty.<sup>11</sup>

From this the court concluded for the integration process that the

character of integration, in this regard also in the case of the European Union, can ultimately lead to protection and strengthening of the sovereignty of member states vis-à-vis external, especially geopolitical and economic factors; for example, also vis-à-vis newly emerging world superpowers, where it is difficult to guess the future priority of values to which they will be willing to subordinate the building of a new order in the globalized world.<sup>12</sup>

Furthermore, the court pointed out that in special areas the state can no longer act efficiently on its own. Additionally, the need for a strong European Union is expressed by the court:

It is an existential interest of the integrating European civilization to appear in

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8 The Czech Republic is a sovereign, unitary and democratic, law-abiding State, based on respect for the rights and freedoms of man and citizen.

9 An international agreement may provide for a transfer of certain powers of bodies of the Czech Republic to an international organization or institution.

10 (2) The substantive requisites of the democratic, law-abiding State may not be amended. (3) Interpretation of legal rules may not be used as authorization to eliminate or imperil the foundations of the democratic State.

11 Para 100 of the judgement Pl. ÚS 19/08.

12 Para 102 of the judgement Pl. ÚS 19/08.

global competition as an important and respected force.<sup>13</sup>

In sum, the CCC highlighted the benefits of the European integration process in a globalized world. It decided that the Czech Republic will not lose its status as a sovereign entity if it ratifies the Lisbon Treaty.

*b) Competence transfer*

What limits on transfers of competence are laid down in the judgement? Or when does the CCC see the Czech Republic as losing its sovereign status? First, the Court states that a transfer of sovereign powers would be prohibited if it led to the abolition of the Czech Republic as a sovereign entity. Thus, the transfer of the competence to decide on its own competence (*Kompetenz-Kompetenz*) is prohibited. Second, the court held that every transfer of competences needs a clear ‘delimitation’ of the transferred powers. The rules in which the transfer is laid down have to be definite and recognizable and they must enable the political organs of the Czech Republic to predict as far as possible the degree to which competences are actually transferred.<sup>14</sup>

The only material restriction for any transfer of competences to another political and legal level that can be found in the ruling is this:

These limits should be left primarily to the legislature to specify, because this is **a priori a political question**, which provides the legislature wide discretion; interference by the Constitutional Court should come into consideration as *ultima ratio*, i.e., in a situation where the scope of discretion was clearly exceeded, and Art. 1 par. 1 of the Constitution was affected, because there was a transfer of powers beyond the scope of Art. 10a of the Constitution. An analogous approach was taken by the Polish Constitutional Tribunal in its decision on the constitutionality of Poland’s accession to the EU, of 11 May 2005 (see judgment K 18/04, OTK ZU (2005) ser. A, nr. 5, pol. 49)<sup>15</sup> [emphasis added].

Here, the court grants the legislature a wide room for manoeuvre. For further steps in the European integration process the Czech government has the possibility to create this process, although the last word lies with the court. Furthermore, with this statement the court expressed confidence not only in the European project but also in its own government.

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13 Para 105 of the judgement Pl. ÚS 19/08.

14 Bříza, note 5 above, 152.

15 Para 109 of the judgement Pl. ÚS 19/08.

c) *Judicial control*

Judicial control can be executed on two different levels. The first level concerns the question whether a European act is covered by the European competence catalogue or whether it is outside the competences of the EU. In the latter case such an act is a so called ‘ultra-vires’ act. Regarding the judicial control of ‘ultra-vires’ acts the CCC stated that such a control ‘*is more in the nature of a potential warning, but need not ever be used in practice*’<sup>16</sup>. Secondly the judicial control regarding human rights protection was brought up by the court. Here, the court repeated its findings from the Sugar Quotas case<sup>17</sup> which stated that if

‘the standard of protection ensured in the European Union were unsuitable, the bodies of the Czech Republic would have to again take over the transferred powers, in order to ensure that it was observed’<sup>18</sup>.

Here, the court continued the GCC ‘solange’ jurisprudence.

### **3. The Judgement of the German Federal Constitutional Court**

Unlike the judgement of the CCC, the decision of the GCC from 30 June 2009<sup>19</sup> is the final say, at least regarding the question of the Lisbon Treaty’s compatibility with German Basic Law. The scope of review of the GCC focused on Article 38 (1) sentence 1<sup>20</sup>, Article 79 (3)<sup>21</sup> and Article 20 (1) and (2)<sup>22</sup> of the German Basic Law. The court stated that

the right to vote establishes a right to democratic self-determination, to free

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16 Para 139 of the judgement Pl. ÚS 19/08.

17 Judgment Pl. ÚS 50/04 of 8 March 2006. The English version of the judgement is available at: <[http://angl.concourt.cz/angl\\_verze/doc/p-50-04.php](http://angl.concourt.cz/angl_verze/doc/p-50-04.php)>.

18 Para 196 of the judgement.

19 The English version of the judgement No 2 BvE 2/08 is available at: <[https://www.bundesverfassungsgericht.de/entscheidungen/es20090630\\_2bve000208.en.html](https://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208.en.html)>.

20 Members of the German *Bundestag* shall be elected in general, direct, free, equal, and secret elections.

21 Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.

22 The Federal Republic of Germany is a democratic and social federal state. (2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive, and judicial bodies.



and equal participation in the state authority exercised in Germany and to compliance with the principle of democracy including the respect of the constituent power of the people.<sup>23</sup>

Unlike in the Czech constitution, no special review clause for European or international treaties exists in the German Basic Law or in the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz – BVerfGG*). Therefore, the Court acted in response to an *Organstreit* proceeding<sup>24</sup> and to constitutional complaints.

#### a) *The German sovereignty*

The GCC's understanding of sovereignty differs from that of its Czech counterpart. Where the CCC emphasized the goal of efficient governance and a strong player within the global sphere, the GCC is much more reluctant. Mainly it highlighted the task of the EU to keep peace in Europe. For example the GCC stated that

the Basic Law wants the participation of Germany in international organisations, an order of mutual peaceful balancing of interests that is established between the states and organised cooperation in Europe.<sup>25</sup>

However, as an aside the court also mentions that the integration in the European Union '*strengthens the possibilities of shaping policy by joint coordinated action*'<sup>26</sup>. One paragraph later the court emphasizes the national autonomy by stating that

[d]emocratic constitutional states can gain a formative influence on an increasingly mobile society, which is increasingly linked across borders, only by sensible cooperation which takes account of their **own interest** as well as of their common interest [emphasis added].

In the end, the GCC comes to a conclusion similar to that of the CCC. While an abandonment of Germany's sovereignty is prohibited by German Basic Law, the Treaty of Lisbon can be legally ratified as it does not establish a federal European state. Though, the perspective regarding the European integration is less enthusiastic and always emphasises the retention of national autonomy spheres.

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23 Para 208 of the judgement No 2 BvE 2/08.

24 This proceeding was only 'admissible to the extent that the applicant asserts a violation of the competences of the German Bundestag decide on the deployment of the German armed forces' (para 167 of the judgement No 2 BvE 2/08).

25 Para 222 of the judgement No 2 BvE 2/08.

26 Para 220 of the judgement No 2 BvE 2/08.

*b) Competence transfer*

At first glance the restrictions formulated by the GCC for a transfer of competences are similar to those laid down in the CCC's judgement. A transfer of the competence to decide on its own competence (*Kompetenz-Kompetenz*), the GCC states, would be prohibited.<sup>27</sup> Furthermore, the rules for the transfer have to be precise.<sup>28</sup> Another restriction laid down in the judgement is that the member states must retain 'sufficient space for the political formation of the economic, cultural and social circumstances of life'<sup>29</sup>. However, in the next step of the ruling the GCC goes more into detail when discussing those political decisions that, in its view, have to be decided by the German parliament. In doing so, the court lays down some rigid material boundaries for further European integration. The GCC names five issue areas in which the exclusive competence has to remain at the national level:

- (1) citizenship,
- (2) civil and the military monopoly on the use of force,
- (3) revenue and expenditure, including external financing,
- (4) all elements of encroachment that are decisive for the realisation of fundamental rights, above all as regards intensive encroachments on fundamental rights (such as the deprivation of liberty in the administration of criminal law or the placement in an institution),
- (5) cultural issues such as the disposition of language, the shaping of circumstances concerning the family and education, the ordering of the freedom of opinion, of the press and of association and the dealing with faith or ideology.

*c) Judicial review*

Like the CCC the GCC reiterated the above-explained ultra-vires review<sup>30</sup>. Yet, the GCC gives this review possibility not the status of a potential warning, but elaborates the consequences of such a review, namely that this '*can result in Community law or Union law being declared inapplicable in Germany*'. Regarding the fundamental rights jurisdiction the GCC repeated its 'solange doctrine' to which also the CCC referred in their judgement:

The Federal Constitutional Court no longer exercises its jurisdiction to decide

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27 Para 233 of the judgement No 2 BvE 2/08.

28 Para 236 of the judgement No 2 BvE 2/08.

29 Para 249 of the judgement No 2 BvE 2/08.

30 Paras 240 ff. of the judgement No 2 BvE 2/08.

on the applicability of secondary Union law and other acts of the European Union [...] merely as long as the European Union guarantees an application of fundamental rights which in substance and effectiveness is essentially similar to the protection of fundamental rights required unconditionally by the Basic Law.<sup>31</sup>

#### 4. Conclusion

The perspectives of both courts towards the European integration process differ highly. The GCC is quite reluctant and upholds the flag of national autonomy. In the decision an undertone can be found saying ‘integration, but’, especially when it comes to the barriers for competence transfer. In the view of the CCC, however, the European integration process is an opportunity for the Czech Republic to gain power in the globalized world.

In my view, the GCC should have read the decision of the CCC more intensively and, at least in some parts, should have adopted the same course. The rigid and negative glance at the Lisbon treaty has misled the GCC sometimes and has narrowed its view for interpretation possibilities beforehand. For example, the definition of issue areas that have to be retained at the national level: here, unlike the very open interpretation of the CCC, the GCC chooses a too rigid interpretation. The wide discretion of the CCC’s interpretation combined with an *ultima-ratio* control function for the judiciary is more in line with the previous decisions (Solange I, II and Maastricht) of the GCC. Furthermore, the CCC’s course gives this court the possibility to participate actively in the integration process. The rigid decision of the GCC gives the German courts and government less space for such participation. Firstly, because by laying down those five areas the court curtailed its own possibility to develop other areas or issues that have to remain at the national level. The threat of the *ultima-ratio* control for other areas is no longer an active threat. Secondly, a good threat is a threat that does not have to be put into action. If a threat is carried out, like in this case, this means that it has been unsuccessful. In finally executing its longstanding Solange threat, the GCC has spent almost all of its ammunition. Thirdly, these five areas will stand in the way of the GCC in later cases in which the determination of the European integration process is discussed. Fourthly, it is quite questionable whether the GCC’s catalogue of national competences can, today and even more so in the future, be dealt with at the national level only.

In addition by deducing the above-cited five areas of the so-called eternity

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31 Para 191 of the judgement No 2 BvE 2/08.

guarantee in Article 79 (3) of the German basic law, the GCC also goes a step too far in a different regard. With this determination it crosses the boundary of the competence to develop the law by judicial interpretation. In a first step, the GCC invokes the rather broad right of self-determination, only to curtail then this right by establishing its rigid catalogue of boundaries.

Interestingly, the part mentioning the five areas in the GCC judgement was cited by the Czech senators in the second submission to the CCC. These areas were declared as the ‘untouchable’ national domain. A transfer of such competences therefore interferes with a ‘core sovereignty’ area. Unlike the GCC the senators were of the opinion that some of these competences would be transferred to the European level by ratifying the Lisbon Treaty.<sup>32</sup> Thus, it’s interesting to have a look at the English translation of the judgement and the court’s response to this opinion.

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32 Ivo Slosarcik, ‘The Treaty of Lisbon & the Czech Constitutional Court: Act II’, CEPS Policy Brief (2009), 1-4, 3.



# **Disappointment, Some Satisfaction, and a Little Bit of Hope: On the Social Content of the Lisbon Ruling**

*Martin Höpner*

The complex Lisbon ruling by the German Constitutional Court (GCC) can be assessed from a number of viewpoints. I shall take a politico-economic perspective, by which I mean the implications for the ability of democratic polities to reach agreement on market-correcting measures, to implement them, and to keep them stable. It is not surprising that the deepening of European integration does not leave this ability untouched.

Social regulation, in the wider sense in which I use the term, encompasses various kinds of market-restricting policies, including not only the regulation of social insurance, but also, for example, labour law, the ability to levy taxes to finance the welfare state, or the ability to organize certain economic sectors on the basis of principles other than those of pure competition. These different instances of ‘creative leeway’ emerged in specific historical circumstances and were always subject to political contestation. Liberal economists have traditionally declared themselves in favour of removing such leeway from the democratic toolbox. Hayek, in particular, pinned his hopes of stemming such regulations on European integration.<sup>1</sup> In this context, my worries relate to a number of rulings by the European Court of Justice (ECJ) which – often surprisingly, because they were neither foreseen nor intended by member states – declared that national regulations amounted to unjustified restrictions on Internal Market freedoms, without there being any realistic possibility of political re-regulation at the European level.

In what follows, I shall show why I consider the social regulation *assertions* of the Lisbon ruling inadequate; why the social regulation *implications* of the ruling are, however, a step in the right direction; and why these implications may in no way substitute for a *solution* of the underlying problems.

## **1. Disappointment Concerning the Treatment of Social Policy Problems**

Among the subjects of both the Gauweiler suit and the suit of the Left Party was improper restrictions imposed on social regulation by European bodies and, in

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1 Friedrich A. Hayek, *Individualism and Economic order*, Chicago/London 1948, Ch. 12.

particular, by the ECJ's expansive interpretation of the basic freedoms (free movement of persons, goods, capital and services). For example, the authors of the Gauweiler suit alleged that the ECJ has 'unleashed a deregulation dynamic which promotes marketization at the expense of social justice'.<sup>2</sup> As might have been expected, given the hearing in Karlsruhe on 10-11 February 2009, the Lisbon ruling deals with social policy problems within an extremely confined space.<sup>3</sup> In its ruling, the Court is uncompromisingly following the argumentation of Franz Mayer, who represented the *Bundestag* in the negotiations.<sup>4</sup> The judges in Karlsruhe referred to the numerous mentions of 'social' in the treaties, protocols and non-binding integration policy declarations, ranging from the obligation to promote 'economic and social progress' in the Preamble of the Treaty to the explicit mention of 'the social function of sport' in Art. 165, para. 2 of the Treaty on the Functioning of the European Union (both at para. 396 of the ruling): where so much attention is paid to the social, how can there exist a social deficit? In addition, the Court declared that the ECJ 'has developed principles in its case law which strengthen the social dimension of the European Union' and has even established 'a European fundamental right to strike'.<sup>5</sup> As a result, 'there is nothing to indicate' that the member states have been deprived of 'practical means of action' with regard to social matters.<sup>6</sup>

Sadly, the Court falls short of an analysis of the consequences of European market-creating integration for the social correction of capitalism. The heart of the problem lies in a highly effective reversal of the principle of subsidiarity, which has emerged from ECJ case law on the nature and scope of the basic freedoms. In applying the principles developed in the rulings in *Dassonville* and *Cassis de Dijon*,<sup>7</sup> the ECJ puts market-restricting rules on an *institutionalized defensive*, even if they apply without discrimination and equally to nationals and foreigners alike. In the ECJ's expansive interpretation, every regulation which *could* make the exercise of one of the basic freedoms *less attractive* constitutes an instance of restriction. Since the *Gebhard* ruling,<sup>8</sup> a four-stage test has been applied uniformly to all four freedoms: limitations on the basic freedoms are permissible only if they are justified on the basis of – narrowly defined – compelling reasons of general interest; if they are applied in a non-

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2 GCC, para 269.

3 See, in particular, the eight recitals GCC, paras 392 ff.

4 Cf. Franz C. Mayer, 'Der EuGH als Feind? Die Debatte um das soziale Europa in der europäischen Rechtsprechung', *Integration* 32 (2009), 246-265.

5 Both at GCC, para 398.

6 GCC, para 399.

7 ECJ, *Dassonville*, C-8/74 and *Cassis de Dijon*, C-120/78.

8 ECJ, *Gebhard*, C-55/94.

discriminatory fashion; if they are suitable for securing the attainment of the objective pursued; and if they do not go beyond what is necessary to attain the objectives.<sup>9</sup>

In parallel with this, the ECJ has continued to develop another line of case law: the horizontal effect of the basic freedoms on private parties (for the first time in *Defrenne II*).<sup>10</sup> One of the highlights of this case law so far is the *Laval* ruling (C-341/05)<sup>11</sup>, which prohibited Swedish trade unions from interfering with the exercise of one of the basic freedoms through collective action, if such action does not meet the four test criteria of the *Gebhard* ruling.<sup>12</sup> What concerns me here is the practical constriction of democratic scope of action precisely in the sensitive area of the political definition of the limits of the market. Even when national laws (or the actions of private citizens) meet the criteria of the *Gebhard* formula, the constellation must not be confused with sovereignty (or, less pathetically: autonomy). Sovereignty means being able to decide for *oneself* whether a measure which sets limits on the market, and which, in accordance with the European treaties, lies in the exclusive competence of the member states, shall stand, without having to justify its existence before the European Court of Justice. The most recent expansive interpretations of the basic freedoms are therefore, to put it bluntly, declarations of war on regulated capitalism – a realization which has not yet dawned on German politicians (apart from a few exceptions) and which has found its way into the trade union debate on Europe only recently and very gradually.

## **2. Hopes Concerning the Effectiveness of the Identity and Ultra-Vires Reviews**

The Lisbon ruling does not represent an adequate response to this problem. Nevertheless, some of its contents may be suitable for putting a stop to the overinterpretation of the scope of the basic freedoms. I shall illustrate this in terms of a particular market-limiting institution, namely German codetermination at the supervisory-board level of large companies.

With its rulings in *Centros*, *Überseering* and *Inspire Art*,<sup>13</sup> the ECJ de facto

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9 See para 37 of the *Gebhard* ruling.

10 ECJ, *Defrenne II*, C-43/75.

11 ECJ, *Laval*, C-341/05.

12 For more detail, see Christian Joerges and Florian Rödl, 'Informal Politics, Formalised Law and the "Social Deficit" of European Integration: Reflections after the Judgments of the ECJ in *Viking* and *Laval*', *European Law Journal* 15 (2009), 1-19.

13 ECJ, *Centros*, C-212/97; *Überseering*, C-208/00; *Inspire Art*, 167/01.



transformed company codetermination from a mandatory into an optional institution. Making reference to potential obstacles to freedom of establishment, the Court granted foreign letterbox companies the protection of European law: member states must put up with foreign company legal forms on their territory, even if they do not engage in any economic activity in the place they are founded (imposing the option of *company-law shopping*). At the same time, with *Commission v. Portugal* a series of ECJ rulings commenced with which the Court,<sup>14</sup> with reference to potential obstacles to free movement of capital, proceeded against so-called ‘golden shares’ (special voting rights for administrative bodies at general meetings or restrictions on voting rights with comparable effect). Such special voting rights, according to the European Court, have the potential to deter foreign investors. In this way, the ECJ has subjected stock corporation and company law, which in actual fact belongs to the exclusive competences of the member states, to the scrutiny of European law.

At the time of writing, it is expected that a case concerning the right to mandate supervisory board members will be brought before the ECJ.<sup>15</sup> Specifically, what is at issue is the right of the Krupp-Stiftung, laid down in the statutes of ThyssenKrupp, to mandate three representatives to the company’s supervisory board. Since neither the ten seats of the employees’ side nor the three seats of the Krupp-Stiftung can be supplanted in the event of a takeover, the ECJ may discern a restriction on free movement of capital here (because, in effect, the disputed regulation could make the acquisition of shares in the company less attractive). From here it would be merely a short step to a ruling against the German Codetermination Act of 1976. A restriction on free movement of capital by means of company codetermination would undoubtedly be approved. The ECJ would, in all probability, acknowledge employee protection as a compelling reason in the general interest. How the Court would rule on the proportionality of the measure, in contrast, remains an entirely open question, since international comparison shows that considerably more modest provisions on employee codetermination are sufficient to ensure consultation and social peace.

In short, an ECJ ruling against German codetermination is a hypothetical but, based on the ECJ’s interpretation of the internal market freedoms, possible outcome (which, in my opinion, perfectly illustrates how dubious this interpretation is).<sup>16</sup> The added value of the Lisbon ruling lies in the fact that the Ger-

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14 ECJ, *Commission v. Portugal*, C-483/99.

15 For details, see *Frankfurter Allgemeine Zeitung*, 30 September 2009, 23.

16 A cynic would add: The Court could, in the same ruling, even establish a European fundamental right of employee consultation, whose exercise must, of course, comply with internal market regulations. Precisely this happened in the rulings on *Viking* (C-

man Constitutional Court would have to judge such an ECJ ruling to be inapplicable. Both the identity review developed in the ruling and the ultra-vires review, with which the German Constitutional Court defines limits of the supremacy of European law over national law, could apply in the case of an anti-codetermination ruling of the ECJ. It is in this respect, not in the closer involvement of the *Bundestag* and the *Bundesrat* in the realization of European legal acts urged by the Court, that I see the decisive and long-term innovation of the Lisbon ruling.

### **3. A Defensive Reaction – Not a Solution to the Problem**

The Lisbon ruling is far from being able to provide a solution to the social and democratic problems of European integration or even from wanting to do so. The causes of the asymmetry between negative and positive integration are of a structural, political-economic and political nature and cannot be disposed of either by this or by another Constitutional Court ruling.<sup>17</sup> That applies in particular to the positive integration, blocked at European level, which – in contrast to negative integration – cannot be accelerated by court rulings.

The instruments developed in the Lisbon ruling are suitable, at best, for use against specific, selected outcomes of ‘integration by law’. In the case of an ECJ ruling directed against codetermination, the identity review and the ultra-vires review may take effect. In contrast, they would not take effect in cases in which ECJ rulings affect the relevant institutions merely indirectly, but nevertheless transformatively. The same holds true in cases in which reinterpretation of law takes place not by means of a ‘big bang’, but through slow steps, occurring over long periods. For example, the ECJ’s extraordinarily restrictive tax-law rulings, in which the Court has, step by step, declared attempts to stem international tax arbitrage to be violations of Internal Market freedoms,<sup>18</sup> may, in the end, produce as much economic liberalization as *Centros* and *Laval*, because they systematically narrow the revenue base of welfare states.<sup>19</sup> Pre-

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438/05) and *Laval*, in which the right to strike was elevated to a European fundamental right, although the core of the rulings consisted in the *prohibition* of unjustified interference with internal market freedoms through collective action. Compare, in this connection, the German Constitutional Court’s comment at recital 398 of the Lisbon ruling that, in *Viking*, the ECJ had ‘even’ established the existence of a fundamental right to strike.

17 See Fritz W. Scharpf, *Governing in Europe: Effective and Democratic?* Oxford/New York 1999, Ch. 2.

18 For example in: ECJ, *Marks and Spencer*, C-446/03.

19 Steffen Ganghof and Philipp Genschel, ‘Taxation and Democracy in the EU’, MPIfG

sumably they would not be cases for identity or ultra-vires reviews.

The Constitutional Court also declares that, although it discerns *potential* ultra-vires problems, it sees no *manifest* ones.<sup>20</sup> Therefore, where the horse has already bolted – as, for example, with the prohibition on the application of the ‘real seat theory’ in company law (*Centros*) – the Lisbon ruling will do nothing to change the status quo. In these instances, corrections can only be imposed politically and in conflict with Brussels and Luxembourg.

I assume that the Constitutional Court will follow up its words with actions; that is, there will be rulings which declare Community law to be inapplicable. We must wait and see, with some anticipation, whether these rulings will also touch on the scope of the Internal Market freedoms – and how they will look, in detail. Do national regulations really violate European law if they have no apparent transnational implications? Does a national regulation impinge on the basic freedoms even if its restrictive effect is merely hypothetical? Has it really been the intention of the member states to subject collective action by trade unions and employers’ organizations to the test of proportionality? If the Constitutional Court makes good on its words, appropriate case law will have to be developed on this and similar questions.

The tenor of reactions to the Lisbon ruling is rather critical. In my contribution, I have emphasized why I consider some objections by the Court to be justified and urgently necessary. Is there not the danger that the Constitutional Courts of other EU countries will react with similar rulings and that, as a result, European law becomes a patchwork? This objection has some substance. In fact, the Lisbon ruling may herald a process of certain country-specific differentiation with regard to European law. This will not bring the Community to its knees. Non-application of European legal acts and rulings is likely to remain a rare exception and will primarily serve as a warning shot against future attempts to shift competences on the basis of case law. A certain loosening of the principle of uniform national application of European law seems to me the lesser evil in comparison to the unrestrained overinterpretation of European basic freedoms and the resulting Hayekian competition state, stripped of the power to shape the economy. Any fair assessment of the Lisbon ruling must take into account that the underlying problem was not caused by the Constitutional Court.

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Discussion Paper 2007/2, Cologne 2007.

20 Cf., for example, the Court’s formulation at para 238.

# The Lisbon Judgment, Germany's *Sozialstaat*, the ECJ's Labour-Law Jurisprudence, and the Reconceptualisation of European Law as a New Type of Conflicts Law

Christian Joerges

When the idea of a workshop on the Lisbon judgment of the German Constitutional Court (GCC)<sup>1</sup> with Ph.D. researchers of the Bremen International Graduate School of Social Sciences was put forward, it seemed to us that a date after the summer break and before the new academic year would still provide a spontaneous and speedy reaction. So we thought. But we were wrong. The *German Law Journal* had, in its issue of August already published no less than nine case notes, some short, most of them thorough and comprehensive,<sup>2</sup> and since then many more have become available. The great number of players in this concert of voices should have been foreseeable. The dominating tone, however, less so. After a very brief phase of quite positive responses, the wind has changed. Germany's most prestigious court experiences a nearly collective badmouthing.<sup>3</sup> Surprisingly though, J.H.H. Weiler, not particularly respectful in his comments on the, to date, most famous pertinent German judgment,<sup>4</sup> dissented. 'A decision with lights and shadows', he opined.<sup>5</sup> If Weiler's *monitum* has its *fundamentum in re*, the timing of the seminar in Bremen may have been unfortunate; its format, however, was not. Comments, it was decided, should remain brief and stay away from any comprehensive evaluation. The

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- 1 GCC, judgment of 30.6.2009, available at: [www.bundesverfassungsgericht.de; preliminary English translation: http://www.bundesverfassungsgericht.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bundesverfassungsgericht.de/preliminary-English-translation/http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html).
  - 2 German Law Journal 10:8 (2009), Special Section: The Federal Constitutional Court's Lisbon Case; available at <<http://www.germanlawjournal.com>>.
  - 3 Most telling probably <<http://verfassungsblog.de/2009/08/08/hochrangige-juristenfordern-fesseln-fur-karlsruhe/>>.
  - 4 See J.H.H. Weiler, 'Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision', European Law Journal 1 (1995), 219 ff., (also in Olaf Due/Marcus Lutter/Jürgen Schwarze (eds), Festschrift für Ulrich Everling, Band 2, Baden-Baden 1995, 1651 ff.).
  - 5 J.H.H. Weiler, 'Editorial. The "Lisbon Urteil" and the Fast Food Culture', European Journal of International Law 20 (2009), 505-509; the passage cited continues with a generalising harsh critique of the court's many critics: 'A decision with lights and shadows... The real significance of the Lisbon *Urteil* will have to wait for much more careful analysis than that to which we have been treated so far' – 'Can you please substantiate?' one is inclined to ask back: 'Isn't an argument good or bad rather than fast or slow?'

following remarks will comply with this recommendation and present a brief and partial comment, albeit against the background of more complex, if not ambitious, theoretical premises. We will proceed in three steps, namely, first, a reconstruction of the conflicts-law elements to be found in the judgment (I), second, a critique of the recent ECJ labour-law jurisprudence which seeks to show why and how the conflicts-law approach could contribute to a defence of the welfare traditions of ‘Old Europe’ in general, and Germany’s *Sozialstaat* in particular (II), and, third, a critique of the passages on social Europe in the Lisbon Judgment (III).

## 1. Contesting Commitments: Conflicts-Law Dimensions in the Lisbon Judgment

The focus of the remarks in these comments is announced in the title. This title mirrors a concern with the economic prerogatives of the European project, the irresistible embedding of market-building in regulatory politics and its remaining ‘social deficit’,<sup>6</sup> which has come to the fore with particular clarity in the ECJ’s recent jurisprudence on the supremacy of primary and secondary European law over national labour law.<sup>7</sup> The long title also alludes to the suggestion that the understanding of European law as a new type of conflicts law may provide constructive responses to these difficulties.<sup>8</sup>

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6 Ever since Christian Joerges, ‘Markt ohne Staat? Die Wirtschaftsverfassung der Gemeinschaft und die regulative Politik’, in Rudolf Wildenmann (ed), *Staatswerdung Europas? Optionen einer Europäischen Union*, Baden-Baden 1991, 225-268 [‘The Market without a State? States without Markets? Two Essays on the Law of the European Economy’, EUI Working Paper Law 1/96, San Domenico di Fiesole 1996 (<<http://eiop.or.at/eiop/texte/1997-019> and <<http://eiop.or.at/eiop/texte/1997-020>.htm>)] up until *idem*, ‘*Sozialstaatlichkeit* in Europe? A Conflict-of-Laws Approach to the Law of the EU and the Proceduralisation of Constitutionalisation’, *German Law Journal* 10:2 (2009), 336-360.

7 Christian Joerges/Florian Rödl, ‘Informal Politics, Formalised Law and the “Social Deficit” of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval’, *European Law Journal* 15 (2009), 1-19.

8 See Christian Joerges, ‘Rethinking European Law’s Supremacy: A Plea for a Supranational Conflict of Laws’, in Beate Kohler-Koch/Berthold Rittberger (eds), *Debating the Democratic Legitimacy of the European Union*, Lanham MD 2007, 311-327; *idem*, ‘Integration through Conflicts Law: On the Defence of the European Project by means of alternative conceptualisation of legal constitutionalisation’, in Rainer Nickel (ed), *Conflict of Laws and Laws of Conflict in Europe and Beyond – Patterns of Supranational and Transnational Juridification*, Oslo, RECON Report No. 7 (2009), 531-560, available at: <[http://www.reconproject.eu/projectweb/portalproject/Report7\\_ConflictOfLaws.html](http://www.reconproject.eu/projectweb/portalproject/Report7_ConflictOfLaws.html)>.

What should the judgment of the GCC have to do with all these suggestions?<sup>9</sup> A first and preliminary response to this question can be derived from underlining the court's insistence of the interpretation of the Community as a non-hierarchical *Staatenverbund*. The 'values codified in Article 2 TEU Lisbon, ... may in the case of a conflict of laws not claim primacy over the constitutional identity of the Member States...'.<sup>10</sup> This is in sharp contrast with Germany's federal order, within which federal law takes

precedence over conflicting *Land* law. ... European law does not affect the claim to validity of conflicting law in the Member States; it only forces it back as regards its application to the extent required by the Treaties and permitted by them pursuant to the order to apply the law given nationally by the Act approving the Treaty....<sup>11</sup>

It follows from the 'the obligation under European law to respect the constituent power of the Member States as the masters of the Treaties' that there can be no *kompetenz-kompetenz* of the ECJ to determine unilaterally whether the principle of enumerated powers has been respected.<sup>12</sup> 'The *ultra vires* review as well as the identity review can result in Community law or Union law being declared inapplicable in Germany...'.<sup>13</sup>

In these passages, the Court re-iterates, modifies and refines its earlier jurisprudence. They may, therefore, be both interpreted and criticised as a continuation of '*la guerre de juges*' diagnosed by many observers.<sup>14</sup> One should not take them too seriously, however. Our Constitutional Court has, to cite

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9 It is as unsurprising as it is unimportant that the conceptual apparatus of conflict of laws is not consciously used. Pertinent queries are nevertheless unavoidable and at times very visible, albeit much more clearly than in the judgment itself in a post-judgment comment by the Court's Vice-President Andreas Voßkuhle, *Der europäische Verfassungsgerichtsverbund*, TranState Arbeitspapiere: 2009 No. 106 (available at <<http://www.sfb597.uni-bremen.de/>>): Voßkuhle addresses the – potentially conflictual! (at pp. 9, 14) – co-existence of courts with different, albeit overlapping, constitutional functions, rejects explicitly the idea of some comprehensive supremacy of one in the *trias* (at pp.2, 15) and seeks for an *ordo* among them. He identifies guiding principles – including a constitutional *ordre public* (at p. 17)! – as well as the need for an interactive adjudication (at p. 10) – all of this is precisely what a law of conflict resolution is all about.

10 GCC, para 332.

11 GCC, para 335.

12 GCC, para 235.

13 GCC, para 241.

14 See, for example, Monica Claes, *The National Courts' Mandate in the European Constitution*, Oxford 2006, 452 ff.; comprehensively, Franz C. Mayer, *Kompetenz-überschreitung und Letztentscheidung*, Munich, 2001, *passim*.

J.H.H. Weiler again, in ‘its internationally-related case law (...) a well-earned reputation of the Dog that Barks but does not Bite’.<sup>15</sup> This reading, however, does not capture a deeper level of the Court’s reasoning, which Damian Chalmers has identified.<sup>16</sup> There are, indeed, as Chalmers has rightly underlined, two distinct lines of argument in the Court’s reasoning:

One is the defence of constitutional democracy as institutionalised at national level. In the case of Germany, the principle of democratic self-rule is enshrined in Article 38 of the Basic Law and protected by the eternity clause of Article 79 (3).<sup>17</sup> In its explanations of the democratic principle, the Court uses the somewhat cumbersome language of German constitutional doctrine.<sup>18</sup> And yet, if one seeks to identify potential social-philosophical underpinnings of its pronouncements, one will find them informed by, at any rate compatible with, Kantian and Habermasian premises: Those subject to the law must be able to understand themselves as its authors. This type of reconstruction finds additional support in the anchoring of the right to democratic vote in human dignity,<sup>19</sup> and the later much-criticised passages on the derivative authority of the Union,<sup>20</sup> on the ‘one-man-one-vote’ principle,<sup>21</sup> and on the *Sozialstaatsgebot* to which Section II will return.

The second, conflicting reasoning postulates a commitment to European integration. This commitment, so the Lisbon Court finds, is enshrined in Article 23 of the Basic Law.<sup>22</sup> The imposition of a duty of openness to the German legislature and all German courts is recalling the post-war response to the fail-

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15 Note 5 above.

16 See his contribution above.

17 ‘Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible’.

18 GCC, paras 214, 209 ff., 238.

19 GCC, para 211: ‘The citizens’ right to determine, in equality and freedom, public authority with regard to persons and subject-matters through elections and other votes is the fundamental element of the principle of democracy. The right to free and equal participation in public authority is anchored in human dignity (Article 1.1 of the Basic Law)’.

20 GCC, para 229.

21 GCC, paras 279, 282.

22 GCC, para 222: ‘The Preamble of the Basic Law emphasises, after the experience of devastating wars in particular between the European peoples, not only the moral basis of responsible self-determination but also the willingness to serve world peace as an equal partner in a united Europe’. Para 225: ‘The Basic Law wants European integration and an international peaceful order. Therefore not only the principle of openness towards international law, but also the principle of openness towards European law (*Europarechtsfreundlichkeit*) applies’.

ure of the German nation state and the 'bitter experiences' once mentioned in the Draft Constitutional Treaty.<sup>23</sup> It is at the same time a significant complement of, if not departure from, the earlier Maastricht decision.

The – potential – importance and significance of this dual structure in the Court's reasoning stems from the tensions between these two commitments. These tensions should not to be trivialised as a constitutional confirmation of the indeterminacy thesis in critical legal studies. If taken seriously, they can be read as the kernel of a conflicts-law approach to European law. Tensions between conflicting legally-binding objectives are, of course, well-known in all constitutional democracies. In the case of the Union, however, these conflicts are inextricably linked with the competences of the different levels of governance. For precisely this reason, to acknowledge explicitly that the defence of democracy and the integration project are distinct and potentially conflicting objectives is a potentially liberating move. This is because we can then reconceptualise the relation between European Union law and the legal systems of its Member States. Integration can rely on a dignity of its own. It need not aim at reconstituting democracy, as we have institutionalised it in the democratic constitutional state at European level. What we have to consider, instead, are the principles and rules that mitigate between the two commitments – this is what I mean by a new type of European conflicts law.

If one examines the Court's reasoning through such lenses, one discovers pertinent general pronouncement as well as a number of conflict-of-laws rules and mechanisms.

The constitutional state commits itself to other states which are standing on the same foundation of values of freedom and equal rights and which, like itself, make human dignity and the principles of equal entitlement to personal freedom the focal point of their legal order. Democratic constitutional states can gain a formative influence on an increasingly mobile society, which is increasingly linked across borders, only by sensible co-operation which takes account of their own interest as well as of their common interest. Only those who commit themselves because they realise the necessity of a peaceful balancing of interests and the possibilities provided by joint concepts gain the measure of possibilities of action that is required for being able to responsibly shape the conditions of a free society also in the future. With its openness to European integration and to commitments under international law, the Basic Law takes account of this.<sup>24</sup>

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23 OJ C 310/2004, 1 of 16 December 2004.

24 GCC, para 221.



Other pronouncements are more determined. Germany's constitutional identity, so we read again and again,<sup>25</sup> as defined in Article 23.1 sentence 3 in conjunction with the eternity clause of Article 79.3 of the Basic Law is a non-negotiable constitutional *ordre public*.<sup>26</sup> The doctrine of enumerated powers and the obligation of the Union to respect national identities are interdependent.<sup>27</sup> On the other hand, the Court adds that '[w]hoever relies on integration must expect the independent opinion-formation of the institutions of the Union'.<sup>28</sup>

So far, so good. Other pronouncements are less plausible. It is difficult to understand the particular sensitivity of 'decisions on substantive and formal criminal law (1), on the disposition of the police monopoly on the use of force towards the interior and of the military monopoly on the use of force towards the exterior (2), the fundamental fiscal decisions on public revenue and public expenditure, with the latter being particularly motivated, *inter alia*, by social-policy considerations (3), decisions on the shaping of circumstances of life in a social state (4) and decisions which are of particular importance culturally, for instance as regards family law, the school and education system and dealing with religious communities (5)'.<sup>29</sup> The simple explanation, that these matters have 'always been deemed' concerns does not tell us why they must not be Europeanised.

Such reserves seem inconclusive for two reasons. One concerns the coherence of the Court's reasoning. Why do the five fields just named deserve particular attention, while Germany's *Sozialstaatsgebot*, despite its status as a constitutional essential, is taken so lightly? To this query we will turn in the next section. The second reason is the hesitance or failure of the Court to base its arguments upon a constructive vision of the integration project – a deficit to which we will return in the observations.

## 2. The ECJ's Labour-Law Jurisprudence in Conflicts-Law Perspectives

In the numerous comments on the German judgment by the European law community, there is hardly any critical discussion of the performance of the ECJ. This controversy, one may of course argue, is not at issue in a debate on

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25 GCC, paras 218 ff., 226, 239 ff., 332, 339, 343, 364.

26 GCC, para 221.

27 GCC, paras 234, 240.

28 GCC, para 237.

29 GCC, para 252.

the *German* Court. What seems nevertheless difficult to understand and to accept, is that Germany's European law community fails to consider the impact of Europe's growing socio-economic diversity, of the socially asymmetrical repercussions of the integration process<sup>30</sup> and the changing inter- and infranational societal conflict configurations.<sup>31</sup> This not-so-benign neglect of the social and political contexts of European law mirrors the legacy of our sub-disciplinary separations and specialisations. Its implications in European-law discourses are an unfortunate neglect in the public-law division of the European law community of the spheres of *Wirtschaft und Gesellschaft* on the one hand, and a 'hands off' mentality with regard to the constitutional debates in the private-law departments, on the other. – The labour law cases which I am going to review briefly here, however, clearly deserve attention outside the realm of labour law. I will come back to their exemplary importance in the concluding section.

My concern is, for now, limited to an explanation of their conflict-of-laws dimensions.

*1. Viking, 11 December 2007:*<sup>32</sup> Finnish seafarers, employed on the ferry *Rosella*, become aware of the intention of their employer to register the ship in Estonia. Since they were afraid of losing their jobs or being forced to accept lower wages, they took action against their employer by threatening to strike. That was perfectly legal under Finnish law. But, so the Viking line argued, such action was incompatible with Viking's right to free establishment as guaranteed by Article 43 EC.

The response of the ECJ may sound conciliatory, but is, in fact, rigid. The ECJ starts out by solemnly underlining that the 'right to take collective action, including the right to strike ... [is] a fundamental right which forms an integral part of the general principles of Community law'.<sup>33</sup> Then, however, the Court fundamentally re-configures the traditional balance between economic freedoms at European level and social rights at national level, by holding that the Member States, although

still free, in principle, to lay down the conditions governing the existence and

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30 See, very widely debated, Neil Fligstein, *Euro-clash: The EU, European Identity and the Future of Europe*, Oxford, 2008.

31 See, e.g., Lisbeth L. Hooghe/Gary Marks, 'A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus', *British Journal of Political Science* 39 (2008), 1-23.

32 ECJ, C-438/05, *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti*, Judgment of 11 December 2007, 2007 [ECR] I-10779.

33 ECJ, Case C-438/05 (*Viking*), para 44.

exercise of the rights in question ... must nevertheless comply with Community law.... Consequently, the fact that Article 137 EC does not apply to the right to strike or to the right to impose lock-outs is not such as to exclude collective action such as that at issue in the main proceedings from the application of Article 43 EC.

2. Laval, 18 December 2007:<sup>34</sup> Laval, a company incorporated under Latvian law, had won the tender for a school-building on the outskirts of Stockholm. In obtaining the tender, it had profited from the much lower wages from Latvia to Sweden. In May 2004, when work was to commence, and after Laval had posted several dozens of its workers, the Swedish trade unions resorted to hostile action against Laval with such determination and intensity that Laval ceded.

The Unions had acted legally according to Swedish law. This, the Court found to be inconclusive, and it resorted, instead, to the posted workers Directive.<sup>35</sup> This Directive does not, as underlined in its Recital 22, prescribe a comprehensive harmonisation. It requires a number of essential working conditions to be met, so that foreign workers are not placed at a disadvantage. The wage level, however, is not included here. According to Article 3,<sup>36</sup> wages should, in principle, be determined by law or by generally-binding collective agreements. Sweden, however, had not implemented the principle, but relied on the exception provided for in Article 8. It left the determination of wage levels to collective agreements and assumed that their generally-binding quality could also be determined by these agreements.

There, so the Court determined, Sweden was wrong. It found it to be incompatible with the Directive

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34 ECJ, Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Svenska Elektrikerförbundet*, Judgment of 18 December 2007 [ECR] I-11767.

35 Directive 96/71/EC OJ 1996, L 18/1.

35 Article 3 of that directive provides: 'Terms and conditions of employment: 1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1(1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down ... concerning the posting of workers in the framework of the provision of services.' OJ 1996, L 18/1.

36 Article 3 of that directive provides: 'Terms and conditions of employment: 1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1(1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down ... concerning the posting of workers in the framework of the provision of services.' OJ 1996, L 18/1.

to impose on undertakings established in other Member States, ... negotiation at the place of work, on a case-by-case basis, ... so that the undertakings concerned may ascertain the wages which they are to pay their posted workers.<sup>37</sup>

3. Rüffert, 3 April 2008:<sup>38</sup> Rüffert concerned the legality of a tender proffered by one of the German *Länder*, Lower Saxony, which contained a clause indicating that the public authorities were bound to respect existing collective-bargaining agreements, so that tendering firms would also be required to abide by the relevant collective-bargaining agreements. The ECJ held Lower Saxony's legislation to be irreconcilable with Article 49, since it prevented foreign service-providers from benefiting from lower wage costs within their country of origin.

The vital point within the judgment is its evaluation of the protective purpose of the clause committing the public authorities to respect collective agreements: in this respect, the Court held that 'contrary to the contentions of *Land Niedersachsen* and a number of the Governments, such a measure cannot be considered to be justified by the objective of ensuring the protection of workers.'<sup>39</sup>

This finding is all the more remarkable in view of a prior pertinent decision of Germany's Constitutional Court which had explained only in 2006 that:

The combating of unemployment, together with measures that secure the financial stability of the social security system, are particularly important goals, for the realisation of which the legislator must be given a relatively large degree of decisional discretion, and especially so under current, politically very difficult, labour market conditions.<sup>40</sup>

What is at stake? The *problématique* becomes apparent when we rephrase the doctrines on supremacy and pre-emption, and the debates on maximum *versus* minimum harmonisation in terms of a conflict of laws. The basic operation to be undertaken in cases with international dimensions is called characterisation.

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37 Ibidem, para 71; the preceding paragraph reads: 'As regards the requirements as to pay which can be imposed on foreign service providers, it should be recalled that the first subparagraph of Article 3(1) of Directive 96/71 relates only to minimum rates of pay. Therefore, that provision cannot be relied on to justify an obligation on such service providers to comply with rates of pay such as those which the trade unions seek in this case to impose in the framework of the Swedish system, which do not constitute minimum wages and are not, moreover, laid down in accordance with the means set out in that regard in Article 3(1) and (8) of the directive.'

38 ECJ, Case C-346/06, Rüffert v Land Niedersachsen, Judgment of 3 April 2008.

39 Ibidem, para 38.

40 GCC, 1 BvL 4/00 of 11.7.2006, <[http://www.bverfg.de/entscheidungen/lis20060711\\_1bvl000400.html](http://www.bverfg.de/entscheidungen/lis20060711_1bvl000400.html)>.

We have to consider the field in which we are operating. The conflict that we are confronted with, in the perspective of European law, is an application of the economic freedoms, but, in the perspective of the national jurisdictions, involves collective labour law. Which qualification is correct? Which law governs? When posing such questions, we should recall that there is a fundamental difference between these two fields: one represents the law of the market, the other, the emancipation from the market's operations.<sup>41</sup>

But we have to take one further step. Conflict of laws and private international law are concerned with the choice between national systems of rules. Choice-of-law methodologies and private-international-law justice are geared towards the selection of the proper jurisdiction; they represent 'nationalising' endeavours. In the EU, however, we are operating in a multi-level system of governance.

At this point, I may recall my assertions about the implicit conflict-of-laws dimensions of the Lisbon judgment, which are re-stating the *communis opinio* of European law ever since *van Gend en Loos*. The powers of the European level of governance are enumerated. There is no European, state-equivalent *kompetenz-kompetenz*. We cannot assume supremacy, but we do have to address and resolve a conflict. This challenge concerns both levels. As the judgment has explained, under German constitutional law, we have to take two conflicting commitments into account. Does Germany's commitment to integration require the subordination of its *Arbeitsverfassung* to the European freedoms? And *vice versa*, does the European primary law require such subordination. What guidance does Article 137(5) of the Treaty (unchanged by Article 153 of the Treaty of Lisbon) offer? Europe is not empowered to legislate on 'pay, the right of association, the right to strike or the right to impose lock-outs'. This is not a definite answer, to be sure. Its reach and its importance both require more general reflections.

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41 'Dans les sociétés d'Europe de l'Ouest, le droit du travail s'est constitué par émancipation du droit du marché, dénommé moyennant les variations terminologiques qu'il importe de ne pas oublier : liberté du commerce ici, freedom of trade ailleurs... Ce n'est pas que des règles sur le travail n'existaient pas avant cette émancipation, mais elles relevaient d'avantage d'une police du travail, partie plus ou moins autonome d'une police du ou des marchés', thus Antoine Lyon-Caen, 'Droit communautaire du marché vs Europe sociale', Contribution to the Symposium on 'The Impact of the Case Law of the ECJ upon the Labour Law of the Member States', organised by the Federal Ministry of Labour and Social Affairs, Berlin 26 June 2008 (on file with author).

### **3. Conflicts Law as a Response to the European Legitimacy Problematic**

The conflict constellation of the labour law cases is by no means exceptional. Discrepancies between the operation of the European level of governance and national jurisdictions can be observed, albeit in less drastic forms, wherever the solution of a problem requires us to resort to competences which are allocated partly at European, and partly at national, levels of government.<sup>42</sup> Constructive responses can be, and have been found, often enough in innovative decisions.<sup>43</sup>

However, these ‘diagonal’ conflict constellations and their particular *problématique* are symptomatic of a deeper structural problem to which the Lisbon Court refers in its reference to Fritz Scharpf’s decoupling thesis,<sup>44</sup> and its discussion of

the case-law of the Court of Justice has to be taken into account, which, admittedly, has until most recently given rise to criticism of a “one-sided market orientation” of the European Union.<sup>45</sup>

The status of this statement is a bit opaque, but it does lead to the core issues. In its third headnote, the Court explains that the Member States of the Union should ‘retain sufficient room for the political formation of the economic, cultural and social circumstances of life’. This commitment to the legacy of Herrmann Heller is re-iterated later at various stages of the Court’s reasoning.<sup>46</sup> Three, in part, normative and, in part, factual queries follow from this explicit recognition of the social state as an indispensable element of Ger-

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42 Christian Joerges, ‘The Impact of European Integration on Private Law: Reductionist Perceptions’, *European Law Journal* 4 (1974), 378-406; Christoph Schmid, ‘Diagonal Competence Conflicts between European Competition Law and National Regulation: A Conflict of Laws Construction of the Dispute of Book Price-Fixing’, *European Review of Private Law* 8 (2000), 155 ff.

43 See the examples discussed in Christian Joerges, ‘The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline’ (Herbert Bernstein Memorial Lecture 2003), *Duke Journal of Comparative and International Law* 24 (2005), 149-196; also at: <<http://www.iue.it/PUB/law04-12.pdf>>.

44 Fritz W. Scharpf, ‘The European Social Model: Coping with the Challenges of Diversity’, *Journal of Common Market Studies* 40 (2002), 645-670, recently renewed by *idem*, *The Double Asymmetry of European Integration – Or: Why the EU Cannot Be a Social Market Economy*, Cologne: MPIfG Working Paper 09 /12.

45 GCC, paras 394, 398.

46 GCC, paras 217, 253, 257 ff.

many's constitutional identity. One concerns the tensions between Germany's two constitutional commitments. In this respect, the Court's pronouncement seems clear. The social state is a constitutional *ordre public*, which must not be subordinated to integrationist objectives. The second, more factual, query concerns the social state of the Union. Are we really witnessing an erosion of the social state? No, we learn, the tensions perceived by analysts such as Scharpf are 'false conflicts':

Neither is the European Union without any social-policy competences, nor is it inactive in this area. At the same time, the Member States have a sufficient space of competences to take essential social-policy decisions on their own responsibility.<sup>47</sup>

False conflicts and false warnings, the Court continues, because:

(...) there are also no indications justifying the assumption that the Member States are deprived of the right, and the practical possibilities of action, to take conceptual decisions regarding systems of social security and other social policy and labour market policy decisions in their democratic primary areas.<sup>48</sup>

This is an all-too-simplistic response. Not only does the Court fail to substantiate how this fortunate equilibrium came about and which mechanisms ensure its sustainability, it also remains, at best, opaque with respect to a third query which this insistence on Germany's constitutional identity provokes. Does this imply that it is the nation state which is to defend Hermann Heller's constitutional legacy? In the pertinent passages, the Court insists that *Sozialstaalichkeit* 'must remain a primary task of the Member States, even if co-ordination which goes as far as gradual approximation is not ruled out'.<sup>49</sup> This conclusion may do justice to the present state of 'social Europe'. It is, nevertheless, unfortunate, because it seems to insinuate that the tensions between the contrasting commitments to democracy and European integration require a defence of the nation state, without, however, explaining how this objective can be accomplished.

This is by no means the message of the conflicts-law approach. This approach does not content itself with merely acknowledging the normative commitment of the Basic Law to the integration project and the 'bitter experiences' that have motivated its acceptance. The approach also rests on structural arguments with normative implications. As Jürgen Neyer and I expressed it back in 1997:

The legitimacy of governance within constitutional states is flawed in so far as it remains inevitably one-sided and parochial or selfish. The taming of the na-

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47 GCC, para 393.

48 GCC, para 399.

49 GCC, para 259.

tion-state through democratic constitutions has its limits. [If and, indeed, because] democracies pre-suppose and represent collective identities, they have very few mechanisms to ensure that “foreign” identities and their interests are taken into account within their decision-making processes.

In such perspectives, the integration project is functionally and normatively firmly embedded. Its functional reasonableness rests on its potential to resolve problems with which the nation state cannot autonomously cope. Its normative core is a new understanding of European legitimacy. ‘If and, indeed, because’ European commitments compensate structural democracy deficits of the nation states and respond to the interdependency of the Member States and the Union, European integration obtains a dignity of its own.<sup>50</sup>

The hesitancy or refusal of the Lisbon Court to envisage a democratic Europe is deplorable because the Court has failed to develop a constructive vision for the European project. At the same time, the opportunity was missed to confront the ECJ with the fallacies of its recent jurisprudence. This jurisprudence is a fairly dramatic step towards a dismantling of fundamental institutional dimensions of the *Sozialstaat* – and its incompatibility with the social legacy of the integration project. This legacy rests, of course, on sociologically weak grounds. However, the non-establishment of a European *Sozialstaatlichkeit* in the Treaty of Rome was not meant as a deliberate exposure of the Member States to the erosion of their welfare systems, but was based upon the assumptions of liberal economics and the political promise that the opening of European borders would remain compatible with the social embeddedness of their economies.<sup>51</sup> One may question the legal commitments arising from such assumptions and promises. But, then, the argument that Europe’s constitution

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50 See the following passage from Dieter Grimm: ‘Durch die Vergemeinschaftung ehemals exklusiver Zuständigkeiten gewinnen die Mitgliedstaaten der Union gleichzeitig Einflüsse auf der europäischen Ebene und vermittelt über sie auf die anderen Mitgliedstaaten. Bei der Wahrnehmung dieser Einflußmöglichkeiten liegt der Staat an der Leine der nationalen Verfassung, die auf diese Weise ihren Wirkungsbereich über die Staatsgrenzen hinaus ausdehnt, dort allerdings demselben Anspruch anderer Verfassungen begegnet.’ (‘Zur Bedeutung nationaler Verfassungen in einem vereinten Europa’, in Detlef Merten/Hans Papier (eds), *Handbuch der Grundrechte*, Vol. VI 2, Heidelberg 2009, § 168, para 58.

51 This argument has been elaborated in much detail by Florian Rödl in his ‘Labour Constitution’, in *Principles of European Constitutional Law*, Armin v. Bogdandy/Jürgen Bast (eds), 2nd ed., Oxford, forthcoming 2010, and, more recently, his ‘Transnationale Lohnkonkurrenz: ein neuer Eckpfeiler der “sozialen” Union?’ in Andreas Fischer-Lescano/Florian Rödl/Christoph Schmid (eds), *Europäische Gesellschaftsverfassung. Zur Konstitutionalisierung sozialer Demokratie in Europa*, Baden-Baden 2009, 145-160.



is partial, and hence a socially and democratically unfinished project, remains valid.

The starting point of the Lisbon Court, we have to conclude sadly, fails to live up to the promises that we have tried to read into the contest of democracy and integration. It should be acknowledged that the Court did not plead for a protection of the state as such, but as an organisational instrument and guarantee of democratic self-rule.<sup>52</sup> Democratic self-rule, however, is then decoupled from Hermann Heller's legacy without further ado. Equally disappointing, the democracy failure of the nation state goes unnoticed and the potential of the European project to compensate for these failures remain unexplored.

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<sup>52</sup> GCC, paras. 217 ff.

# Being Wrong but Getting It Right? The Lisbon Judgement of the GCC\*

*Susanne K. Schmidt*

## 1. Introduction

In the following, I would like to argue for a more positive assessment of the Lisbon judgement. Obviously, reading the many criticisms of the judgement, one easily agrees: Yes, the Court pursues an idea of parliamentary legitimation one might not share; it assumes for itself a role of umpire that is hard to accept – nationally towards the Parliament and the government as well as towards other Member states and the European institutions; it follows a line of reasoning which is being highly harmful to the EU, particularly if other constitutional courts followed suit.

Therefore, one would have hoped that the GCC had argued differently. And yet: being tied between needing to accept politically the Treaty and having significant grounds for scepticism, maybe this was as good as it could get? After all, the main concerns of the GCC about an incremental expansion of competences overstressing the original mandate next to the problems of democratic legitimation beyond the nation state are well-grounded. Moreover, the concerns about sovereignty that the GCC utters are argued on the basis of democratic self-determination – which is not such a weak point after all. What could be reasons to see the ruling in a more benevolent light, even if one is critical about its precise wording and argumentation?

As a political scientist, I do not see myself well-placed in the following to analyze the ruling as such. Rather I would like to contribute to the question of its impact on the general dynamic of European integration. My argument takes two steps. I first describe the problem of integration through case law by the European Court of Justice (ECJ), the detrimental effects of which can hardly be controlled politically. This implies, secondly, that we need forms of intra-legal remedies if we want to confront a hyperactive ECJ. Seeing the GCC ruling in this context, I draw the conclusion that even when sharing the criticism of the Court's argumentation, within the overall logic of European integration

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\* I would like to thank the participants of the workshop at BIGSSS for their comments. My notes draw on research being undertaken in the context of the Collaborative Research Centre 597 'Transformations of the State', funded by the German Research Foundation.

the Court might have given an important signal.

## 2. The Expansionary Logic of ECJ Jurisprudence

What is the force of de-facto integration through law? The importance of case law for the progress of European integration is well-established in political science.<sup>1</sup> It was Weiler who forcefully showed that the weakness of political actors in European integration at the same time allowed the Court to foster integration during the times of ‘Eurosclerosis’.<sup>2</sup> The very difference that the establishment of direct effect and supremacy of European law could make for European integration became apparent to the wider circle of observers with the Single European Act and the completion of the internal market. Building on the *Cassis* judgement of 1979,<sup>3</sup> market integration was no longer dependent on agreement in the Council of Ministers, but could rely on economic actors, using the fundamental freedoms of the Treaty to escape from the regulatory grip of Member States. Following the example of the freedom of goods, also the other freedoms have been increasingly interpreted as a prohibition of restriction, rather than as simply requiring non-discrimination.<sup>4</sup> The implications are immense: not only different types of market regulations, but also rules of access to universities or to social benefits may be challenged by individual actors, claiming their rights under the basic freedoms.<sup>5</sup> Member states upholding national regulations may therefore be required to justify these rules, and to show that the resulting restriction of freedoms is proportionate. The ECJ has interpreted this need rather strictly, implying that few national regulatory interests stand up to the test.

On the basis of this expansionary jurisprudence, European integration has long reached those areas where the GCC in its ruling sees the need to keep national sovereignty untouched: social services, health care as well as taxes.<sup>6</sup>

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1 Lisa Conant, ‘Review Article: The Politics of Legal Integration’, *Journal of Common Market Studies* 45 (2007), 45-66.

2 Joseph H. H. Weiler, ‘The Community System: The Dual Character of Supranationalism’, *Yearbook of European Law* 1 (1981), 267-306.

3 Karen J. Alter/Sophie Meunier-Aitsahalia, ‘Judicial Politics in the European Community. European Integration and the Pathbreaking *Cassis de Dijon* Decision’, *Comparative Political Studies* 26 (1994), 535-561.

4 Peter Oliver/Wulf-Henning Roth, ‘The Internal Market and the four Freedoms’, *Common Market Law Review* 41 (2004), 407-441.

5 Fritz W. Scharpf, ‘Legitimacy in the Multilevel European Polity’, *European Political Science Review* 1 (2009), 173-204.

6 Dorte Sindbjerg Martinsen, ‘The Europeanization of Welfare – The Domestic Impact

Surprisingly, the GCC ignores this development.<sup>7</sup>

From an intergovernmentalist political-science perspective, one would argue that all this could not happen if the Member States were not agreeing to this extent of integration.<sup>8</sup> However, the balance of powers at the supranational level is such that an independent judiciary gains in influence because of the weakness of the legislature. Different from the national level, ECJ rulings can hardly be counterbalanced politically by the legislature. The much more demanding decision rules at the supranational level protect case law. The weakness of the legislature implies a bias in favour of Court-led integration, as already Weiler observed.<sup>9</sup> Yet, it is not necessary to assume that the Court purposefully advances integration beyond the interest of the Member States. The independence of courts is well-legitimated in the EU, but nevertheless their institutional position may become threatened if they continuously raise public contention with their rulings. Generally, therefore, we can assume that the ECJ like any other court is interested in keeping antagonism at bay.<sup>10</sup> Yet, at the European level this is much more difficult to achieve than it is at the national level. For one thing, the consequences of individual rulings have to be translated into the institutional contexts of the very different Member States. With by now 27 Member States representing increased institutional variation, this is hardly possible. Moreover, different from the national level, where in contentious cases courts get an idea of the public opinion on the underlying issues, public opinion is lacking at the supranational level. If a public opinion forms at all, like with the *Laval* and *Viking* cases, it is already too late. Given this complex institutional environment, the ECJ would be much more dependent on a legislative check than a national court is. Yet, even when compared to constitutional interpretations at the national level, supra- or international case law can hardly be remedied.

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of Intra-European Social Security', *Journal of Common Market Studies* 43 (2005), 1027-1054. Dorte Sindbjerg Martinsen, 'The Social Policy Clash – EU Cross-Border Welfare, Union Citizenship and National Residence Clauses', Paper presented at the 10th Biennial Conference of the European Union Studies Association (EUSA). Montreal, Canada 2007. Philipp Genschel, 'Why no mutual recognition of VAT? Regulation, taxation and the integration of the EU's internal market for goods', *Journal of European Public Policy* 14 (2007), 743-761.

7 See para 117 of the ruling under: <[http://www.bundesverfassungsgericht.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html)>.

8 Andrew Moravcsik, 'Liberal Intergovernmentalism and Integration: A Rejoinder', *Journal of Common Market Studies* 33 (1995), 611-628.

9 Joseph H. H. Weiler, note 2 above.

10 Georg Vanberg, 'Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review', *American Journal of Political Science* 45 (2001), 346-361.

Next to a skewed balance of powers, and a Court which can hardly assess the implications of its rulings anymore, we are faced with an underlying normative basis, the Treaty, favouring certain rights over others. On the basis of the economic freedoms, private actors may overturn national market regulation, despite the higher legitimacy of the latter, by simply referring to European law, whether cross-border issues or trade distortions are directly involved or not. It generally suffices that a restriction of European economic rights is likely. Those actors profiting from the national regulation, in contrast, do not have any means to counter this process of negative integration. Some actors are therefore able to refer to European law, while others cannot. Once case law exists, it leads to a path-dependent process.<sup>11</sup> Precedent motivates actors to turn to European law, if they believe that existing case law favours their interests. This one-sided demand of actors brings a positive feedback towards increased liberalization.

The unfolding of this path-dependent process is not hampered by the fact that for all actors it is difficult to foretell how the court will strike the balance between the interests of individual economic rights and public interest concerns of Member States. Thus, recently, the Court did not take a very liberal line in the last *Doc Morris* ruling (C-531/06). Where most observers would have expected the freedom of services to take precedence over national regulatory concerns, this was not the case. The Court as such can strike the balance in either direction in a single case. But over all cases, as only certain actors claim certain rights from the ECJ, and the Treaty grants predominantly economic rights, the ECJ case law favours these actors and rights over national regulatory interests. The Court's primary orientation is to further integration. And by granting individuals European rights, the Court at the same time fosters the legitimization of the supranational entity which bestows these rights upon these individuals.

We therefore have several structural features for why we see the extension of European competences over national competences, for why it is so difficult to strike a federal balance between national and European competences: European rights are of a certain kind; precedent establishes a positive feedback as actors will address the Court mainly with cases of one specific kind; strengthening individual European rights is a means for the Court to legitimate the European legal order; at the same time, it is hardly possible for the ECJ to as-

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11 Martin Shapiro/Alec Stone Sweet, *On Law, Politics, and Judicialization*, Oxford/New York 2002, 113. I develop this argument further in Susanne K. Schmidt, 'Die Pfadabhängigkeit supranationaler Rechtsprechung. Die Dienstleistungsrichtlinie als Resultat von "lock-in"', Manuscript Bremen, 2009.

sess the national implications of its case law; and the Member states, or the European legislative in general, cannot rein in the Court even if case law is very contentious.

Recently, Vauchez and Alter<sup>12</sup> have shown how European lawyers managed to extend the reach of European law most skillfully, by bringing up cases strategically to foster certain legal interpretations, in order to establish the ECJ as a motor for integration. It is surprising that for long there has not been more inner-legal opposition to this move. After all, it is quite easy to see that European lawyers would be a relevant lobby for the importance of European law. But it is not so easy to understand why national constitutional lawyers, for instance, would not object, or private lawyers<sup>13</sup>, as with the growing relevance of European law the importance of other sub-disciplines is weakened.

I can only sketch here my argument that there are hardly any remedies against a hyperactive court if it is not embedded within a national polity. At the supranational level, it follows from this analysis that opposition can only come from within the legal system.

### **3. The GCC's Ruling: Getting It Right?**

On the basis of this integration dynamics, notwithstanding the general criticism, the ruling achieves two points: It raises awareness about the incremental overstretching of European competences into areas which the Masters of the Treaty aimed at keeping for national democratic decision-making. And it threatens with inner-judicial opposition. It is important to note that this opposition is not in any way exclusively directed to the ECJ but similarly targets the expansionary interpretation of competences by the other European institutions. In its ruling, the GCC gives itself the right to judge over *ultra vires* and sufficient remaining national identity. It is critical that it usurps itself this right, rather than announcing to address preliminary proceedings to the ECJ when in doubt about European law. Using the preliminary ruling procedure would be much more cooperative – and not as threatening to the integrated European legal order. In fact, so far, the GCC has never referred a case to the ECJ, asking

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12 Antoine Vauchez, 'Integration-through-Law' Contribution to a Socio-history of EU Political Commonsense', EUI Working Papers RSCAS 2008/10, Florence 2008; Karen J. Alter, 'Jurist Advocacy Movements in Europe: The Role of Euro-Law Associations in European Integration (1953-1975)', in Alter, Karen J. (ed), *European Court's Political Power. Selected Essays*. New York 2009, 61-89.

13 See Heinrich Honsell, 'Die Erosion des Privatrechts durch das Europarecht', *Zeitschrift für Wirtschaftsrecht* 29 (2008), 621-630.

for an interpretation of relevant European law. Just announcing preliminary procedures would be a much more subtle resistance to overreaching case law, but possibly also too subtle. There would be little incentive for the ECJ to redress the European federal balance. A group of German lawyers was quick to demand from the German legislature to shape this new procedure by requiring the GCC to refer always to the ECJ, thereby reining it in legislatively in its quest for redressing the European federal balance.<sup>14</sup> This, of course, also shows the *problématique* of the ECJ where such responses are hardly possible.

Of course, it is not clear what will become of these GCC procedures to control the transfer of competences to the European level. On the basis of this example, other European constitutional courts might become similarly disapproving of the ECJ. Were all constitutional courts to threaten with opposition, the integration project would be at serious risk. But the amount of criticism the GCC had to face after its judgment does not make it so obvious that it will play constantly the role of umpire over European integration. Given the contention, neither is it likely that too many other constitutional courts will follow suit. Having once faced the threat of national judicial opposition, there is at least the hope that the ECJ will aim to strengthen the dialogue with the national courts in the future, enabling it to assess better the implications of its rulings at the national level, and thereby achieving a greater balance between European and national concerns.

#### 4. Conclusion

In conclusion, it is to be hoped that the ECJ will finally sense the danger of wanting too much at once. A Union of 27+ gives the ECJ tremendous powers – political opposition to case law becomes less likely than ever; and at the same time, the Court may feel that the problems of legislative politics require integration impulses from it. The heterogeneous Union of today has a range of problems – but whether a lack of integration depth counts among them is doubtful. In this situation, the hyperactive ECJ of the Laval and Viking kind may be the greatest menace as it cannot be grounded in sufficient political support. In view of the threat posed by the GCC, it seems most likely that the ECJ will be more careful to balance European requirements against national concerns. If it does, this will be of great service to the integration project.

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14 ‘Auswege aus dem drohenden Justizkonflikt’. <[www.whi-berlin.de/documents/whi-material0109.pdf](http://www.whi-berlin.de/documents/whi-material0109.pdf)>.

# Reinforcing the Asymmetries of European Integration

*Michael Blauburger*

Critical accounts of EU politics diagnose various asymmetries<sup>1</sup> resulting from the dynamics of integration: (1) European integration is dominated by judicial and executive politics rather than legislative politics. (2) The constitutionalization of European Treaty freedoms provides an opportunity structure for individuals claiming their rights, but the capacity to pursue public interest concerns at the national level is undermined and it is not fully compensated for at the European level. (3) Finally and closely connected to both previous aspects, EU integration and EU democratization have not developed synchronously and, therefore, the EU suffers from a ‘democratic deficit’.

These criticisms have been pointed out in the complaints against the Treaty of Lisbon and were discussed during the proceedings before the German Constitutional Court (GCC). The final judgement addresses all of these issues, but it fails to provide any remedy. In contrast, through its interpretation of the integration process so far and by erecting barriers to further integration, the GCC sustains and even reinforces the asymmetrical status quo of European integration.

## 1. The Supremacy of the Judiciary

According to intergovernmentalist theory, European integration mainly helps national governments to emancipate themselves from political constraints at the domestic level.<sup>2</sup> European Treaty rules are negotiated on intergovernmental conferences and European legislation needs approval by the Council of Ministers. On the contrary, neo-functionalist theory emphasises the independence of the ECJ in interpreting the European Treaties and the agenda-setting powers of the Commission due to its exclusive right to propose European legislation.<sup>3</sup> Despite opposed readings of European politics, both approaches agree upon one point: National Parliaments are the losers of integration. Political competences are increasingly transferred to the European level, national parliamen-

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- 1 Cf. Fritz W. Scharpf, ‘The Double Asymmetry of European Integration. Or: Why the EU Cannot Be a Social Market Economy’, Köln: MPIfG Working Paper 09/12 (2009).
  - 2 Andrew Moravcsik, ‘Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach’, *Journal of Common Market Studies* 31(4) (1993), 473-524, 507.
  - 3 Mark A. Pollack, ‘Delegation, Agency, and Agenda Setting in the European Community’, *International Organization* 51(1) (1997), 99-134, 105.



tarians lack time and expertise to control effectively their governments in European affairs, and once new European rules have been negotiated, the choice of national parliamentarians is often one between uncritical ratification and outright rejection.

Initially, the Lisbon judgement received widespread applause for strengthening the position of the German Parliament in European affairs.<sup>4</sup> This applause seems premature at best. Firstly, the judgement hardly affects parliamentary involvement in day-to-day European politics, but it is only concerned with fast-track changes to European Treaty law. The Lisbon Treaty includes several provisions designed to facilitate Treaty modifications without new ratification procedures in the Member states, e.g. the transition from unanimity to majority voting in the Council. The GCC found the German law accompanying the Treaty<sup>5</sup> to be unconstitutional because parliamentary inaction would have been sufficient to approve these Treaty modifications.<sup>6</sup> Following the conditions of the Lisbon judgement, the revised law requires domestic legislation in these cases. Secondly, this enhanced participation of the German parliament as regards Treaty modifications would have been possible without any Court ruling, if the German parliament had simply decided to include these participation rights in the original law. Apparently, national parliamentarians did not see the necessity to do so when they passed the original law with a two-thirds majority. Hence, the GCC truly ‘condemns’ the German parliament to more participation in EU Treaty modifications. But why should we expect parliamentarians to follow this judgement in practice? At the end of the day, Members of the German *Bundestag* (MdBs) still get (re)elected by citizens showing modest interest in European affairs rather than by constitutional judges. Finally, where the Treaty of Lisbon actually tries to enhance participation of national parliaments in day-to-day EU politics this is hardly mentioned in the judgement. During the proceedings in Karlsruhe, one MdB (Thomas Silberhorn, CSU) explicitly argued *for* the Lisbon Treaty, because it would strengthen parliament vis-à-vis the German government – the legal representative of the German parliament (Prof. Franz C. Mayer) rushing to declare that this MdB was only speaking on his own behalf.

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4 See, for example, Heribert Prantl, ‘Europäische Sternstunde’, *Süddeutsche Zeitung*, 1 July 2009, 4 (‘*Das Urteil nimmt den Bundestag in die Pflicht. Dieser wird die EU-Gesetze nicht mehr einfach durchwinken können. (...) Die Abgeordneten werden sich viel mehr als bisher mit Europa befassen müssen. Europa wird also zu einem innenpolitischen Thema. (...) Das Urteil verurteilt den Bundestag zu mehr Demokratie.*’).

5 Act Extending and Strengthening the Rights of the *Bundestag* and the *Bundesrat* in European Union Matters (*Bundestag* document 16/8489).

6 GCC, paras 306-328.

Rather than strengthening the national parliament, the GCC in its Lisbon judgement largely claims the right to decide itself about the appropriate institutional roles and about the distribution of competences between the national and European levels. The German parliament *has* to legislate in all cases of Treaty modifications, despite its original intention not to do so.<sup>7</sup> It *must not* approve any transfer of competences to the European level which touches upon the German ‘constitutional identity’ guaranteed by Art. 79(3) GG – the scope of this guarantee being interpreted (extensively) by the GCC.<sup>8</sup> The European parliament *cannot* claim truly to represent European citizens, only being an organ representing the European peoples<sup>9</sup> – regardless of the explicit wording of the Treaty of Lisbon (Art. 14) and despite the examples of other parliaments such as the US Senate with highly disproportional patterns of representation. The ultimate right to define the boundaries between European and German constitutional law is said to remain in the hands of the GCC,<sup>10</sup> and the supremacy of European law is interpreted narrowly and in latent contradiction to Declaration 17 annexed to the Treaty of Lisbon.<sup>11</sup> The GCC proposes the creation of a new procedure in order to scrutinise European breaches of competences and infringements upon the German constitutional identity – however, if no such procedure gets established, the GCC announces to treat these issues anyway within the existing legal framework.<sup>12</sup> By and large, therefore, the Lisbon judgement is only superficially about redressing the imbalance between branches and about strengthening parliaments – it is much more concerned with the question *which judiciary* has the ultimate say and it provides a clear answer in favour of the GCC’s own position.<sup>13</sup>

## **2. The Individual-Rights Bias of the Judiciary**

European integration does not only exhibit a high degree of judicial politics, but these judicial politics have an asymmetrical impact themselves. Most prominently, Fritz Scharpf<sup>14</sup> has argued that the institutional structure of the

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7 GCC, paras 413-417.

8 GCC, paras 218, 249.

9 GCC, para 217.

10 GCC, para 240.

11 GCC, paras 72-77, 331.

12 Para 241.

13 See also Christoph Möllers, ‘Was ein Parlament ist, entscheiden die Richter’, *Frankfurter Allgemeine Zeitung*, 16 July 2009, 27.

14 Fritz W. Scharpf, *Governing in Europe: Effective and Democratic?* Oxford/New York 1999, 43 ff.

EU is biased towards negative integration. On the one hand, the ECJ forcefully developed the doctrines of supremacy and direct effect and, thereby, elevated the market freedoms to constitutional principles. On the other hand, due to high consensus requirements and their increasingly heterogeneous interests, Member States were largely unsuccessful in constraining the ECJ and they could only partly compensate their loss of national regulatory authority through harmonisation at the European level. While Scharpf's position was sometimes labelled the 'social-democratic' critique of European integration<sup>15</sup>, conservatives have argued in a similar direction more recently.<sup>16</sup> Despite all differences – Herzog and Gerken criticise the ECJ for rather being 'too social' e.g. in its rulings on antidiscrimination – these critical voices share one common concern: through its interpretation of market freedoms, the ECJ creates *individual rights* for European citizens that tend to undermine the ability of Member States to pursue *public-interest* concerns at the domestic level.<sup>17</sup>

Scharpf proposes that Member States should politically counterbalance ECJ jurisprudence by the threat of open non-compliance against judicial lawmaking, backed up by a qualified majority vote in the Council.<sup>18</sup> Apart from this political approach, others expected the GCC to provide a judicial safeguard for Germany's autonomy to pursue public policies. During the proceedings in Karlsruhe, the German left party (Die Linke, represented by Prof. Andreas Fisahn) basically argued that the ECJ's jurisprudence on the European Treaties infringed upon the German constitutional principle of the 'social state' by establishing an irreversible commitment to an 'open market economy'.<sup>19</sup> The conservative side (MdB Peter Gauweiler, CSU, represented by Prof. Dietrich Murswiek) argued even more generally that the Treaty of Lisbon crosses the 'threshold to the insignificance of the original German legislative competences'.<sup>20</sup> Unsurprisingly, the GCC did not find these complaints convincing in its final judgement – otherwise, it would have had to declare the German agreement to the Lisbon Treaty unconstitutional and trigger a fundamental crisis of the EU. Nevertheless, the Lisbon judgement at its core tries to define

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15 Andrew Moravcsik, 'In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union', *Journal of Common Market Studies* 40(4) (2002), 603-624, 617.

16 Roman Herzog/Lüder Gerken, 'Stoppt den Europäischen Gerichtshof', *Frankfurter Allgemeine Zeitung*, 8 September 2008, 8.

17 Fritz W. Scharpf, 'Individualrechte gegen nationale Solidarität' in Martin Höpner/Armin Schäfer (eds), *Die Politische Ökonomie der europäischen Integration*, Frankfurt am Main 2008, 89-99.

18 Fritz W. Scharpf, 'Legitimacy in the Multilevel European Polity', *European Political Science Review* 1(2) (2009), 173-204, 199 f.

19 GCC, para 117.

20 GCC, para 103.

limits of European interference at the domestic level and clearly threatens with German disobedience in cases in which these limits are not respected.<sup>21</sup> Even though the GCC has not found any instance of European law *ultra vires* so far, one might argue, the threat is out there and – as any ‘nuclear option’<sup>22</sup> – it is most successful, if it does not have to be used.

Yet, this threat is very unlikely to change anything about the asymmetry described above between individual rights and public interests concerns. In contrast, the GCC is pre-dominantly concerned with individual rights itself, which becomes clear from its interpretation of the remaining core of state sovereignty. Accordingly, Member states need to

retain sufficient space for the political formation of the economic, cultural and social circumstances of life. This applies in particular to areas which shape the citizens’ circumstances of life, in particular the private space of their own responsibility and of political and social security, which is protected by the fundamental rights, and to political decisions that particularly depend on previous understanding as regards culture, history and language and which unfold in discourses in the space of a political public (...).<sup>23</sup>

Already during the proceedings, the constitutional judges devoted much more time to questions of criminal law than any of the complainants. In its list of particularly sensitive areas of state sovereignty, criminal law is followed by the monopoly of force.<sup>24</sup> If the attention devoted during the proceedings as well as order and text length in the judgement reflect the GCC’s own priorities, then we should expect clashes with European judges to be most likely in those areas in which European public policies can infringe upon individual freedoms, i.e. as regards the prosecution of particular crimes or the legality of telecommunications-data retention. Conversely, the paragraphs on the principle of the ‘social state’<sup>25</sup> are kept very brief and conclude simply that there are ‘no indications justifying the assumption that the Member States are deprived of the right, and the practical possibilities of action, to take conceptual decisions regarding systems of social security and other social policy and labour market policy decisions’. In striking contrast to the critical tenor of the judgement, the GCC affirmatively cites ECJ rulings on EU social citizenship to justify its position.<sup>26</sup> Thus, combined with the claim that ‘essential decisions in social pol-

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21 GCC, paras 240 f., 340.

22 Ibidem.

23 GCC, para 249.

24 GCC, paras 253ff., 351 ff.

25 GCC, paras 392-399.

26 GCC, paras 395, 398.

icy (...) must remain a primary task of the Member States'<sup>27</sup>, this endorsement of ECJ jurisprudence reaffirms existing asymmetries and even seems to preclude political integration which touches upon 'essential decisions' in this policy field.

### 3. The Adherence to a State-Centred Model of Democracy

Finally, if the process of European integration disadvantages national parliaments and if it reduces the autonomy of Member States to pursue public policies, this raises the question of democratic legitimacy of EU politics. Only few political scientists still maintain that the EU does not suffer from any 'democratic deficit'.<sup>28</sup> Most others rather differ on whether and how this deficit could be reduced.<sup>29</sup> Yet, the GCC strongly reaffirms the *status quo* again – denying already existing deficits while precluding future steps to democratise EU politics.

During the proceedings in Karlsruhe, one major point of debate addressed the further democratisation of EU politics required by additional steps of integration ('*schritthaltende Demokratisierung*'). In his introductory remarks, Judge Di Fabio emphasised that governance in supranational organisations and networks was not *per se* incompatible with democratic principles and that it should not be measured against a traditional state model of democracy. Also, the judgement reaffirms that: 'In principle, the principle of democracy is open to the requirements of a supranational organisation'.<sup>30</sup> Despite this rhetoric, however, the judgement largely dismisses the possibility of more than marginal democratic legitimacy beyond the nation state or of any intermediate stages towards a state-like EU democracy. The term '*schritthaltende Demokratisierung*', stemming from the GCC's 1993 Maastricht judgement, does not reappear in the Lisbon judgement. Instead, the EU is merely 'free to look for its own ways of democratic supplementation'.<sup>31</sup> Most importantly, the European parliament is not considered to provide substantial democratic legitimacy because of its disproportional representation of European citizens.<sup>32</sup>

In any event, for the Court, the European Parliament remains a marginal institution (...). With its ruling, the Court has expressed its wish to prevent the

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27 GCC, para 259.

28 Moravcsik, note 15 above.

29 Armin Schäfer, 'Nach dem permissiven Konsens. Das Demokratiedefizit der Europäischen Union', *Leviathan* 34(3) (2006), 350-376, 351.

30 GCC, para 267.

31 GCC, para 272.

32 GCC, para 280.

European Union from developing its own democratic legitimacy as a second pillar of a European compound system, where governmental decisions are made at two levels in two different institutional contexts. In our age of globalization, it seems fairly odd to contend that genuine democracy can exist only within the framework of the nation-state.<sup>33</sup>

Moreover, by adhering to a state-centred model of democracy and negating its applicability to the EU, the GCC also manages to deny already existing democratic deficits: ‘The European Union complies with democratic principles because a qualitative look at the structure of its responsibility and of its rule reveals that it is exactly *not laid out in analogy to a state*’.<sup>34</sup> The judgement remains vague as to how – according to this negative definition of supranational democracy – the EU could ever be found to be democratically deficient as long as it does not aspire to become an entity ‘in analogy to a state’. Hence, the asymmetries described above and their critical implications for democratic legitimacy at the national level are defined away; the increasing difficulties of 27 EU Member States to change a political path once taken or to correct judicial lawmaking at the EU level are not addressed as problems of democratic legitimacy. As a result of circular reasoning, any effort to redress the imbalance between EU integration and democratisation appears to be unnecessary and/or impossible: Only as a state could the EU be (truly) democratic. Not being a state, the EU does not need to be (truly) democratic.

In sum, the German Lisbon judgement reinforces already existing asymmetries of European integration. The ECJ’s important role in pursuing ‘integration through law’ is mirrored by the GCC reasserting its ultimate right to control the limits of integration. Both judiciaries are primarily concerned with individual rights which are seen to be potentially threatened by domestic or European public policies. Already existing democratic deficits are tolerated in the judgement while new obstacles for a democratisation of EU politics are erected.

Presumably, this critical reading of the Lisbon judgement can be criticised itself for being based on undue expectations of how the GCC could solve political problems. Judicial self-restraint rather than the GCC’s ‘most fundamental of all fundamental judgements’<sup>35</sup> could have prevented such expectations and, at the same time, it would have left more routes open for redressing imbalances of European integration. The latter task – it is even more obvious after the Lisbon judgement than before – is an essentially political one.

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33 Christian Tomuschat, ‘The Ruling of the German Constitutional Court on the Treaty of Lisbon’, *German Law Journal* 10(8) (2009), 1259-1261, 1261.

34 GCC, para 278, emphasis added.

35 Prantl, note 4 above.



# Accountability Without Politics?

## The Contribution of Parliaments to Democratic Control of EU Politics in the German Constitutional Court's Lisbon Ruling

Arndt Wonka

### 1. Introduction

In its ruling, the German Federal Constitutional Court (GCC) declares the Lisbon Treaty and the consequent changes of the German Basic Law (GG) as constitutional. However, the legislation dealing with the implementation of the Lisbon-Treaty rules on the involvement of national parliaments in the European Union (EU) (*Ausweitungsgesetz*) is declared unconstitutional. The GCC demands changes that strengthen the institutional involvement of the *Bundestag* and, in case *Länder* competences are touched, also that of the *Bundesrat* in the areas of criminal law and EU military interventions and, perhaps most importantly, in any changes of the primary EU treaty law based on Article 48 EUV as well as the decisions based on the general clause of Article 352 AEUV (GCC, 2 BvE 2/08, 406–420). The GCC bases its ruling on Article 38 of the German Basic Law (GG), in combination with Articles 20, 79 and 23 GG, which demand that German citizens can hold their government accountable and exert significant influence on the direction of (German) public policy through parliamentary elections. The public reactions to the GCC's ruling varied strongly. Some welcomed the strengthening of the *Bundestag* and *Bundesrat* emphatically as an important contribution towards an increase of the democratic legitimacy of the EU in Germany<sup>1</sup>. Others, however, have strongly criticized the GCC for thinking of the democratic legitimization of the EU exclusively in national categories, for restricting the capacity of the German government to act at the EU level thereby supposedly putting breaks on the EU's overall capacity to act, and, finally, for claiming for itself the right to decide on the limits of German legislators' future transfers of competencies and sovereignty to the EU<sup>2</sup>.

This contribution discusses the role the GCC assigns to the *Bundestag* and *Bundesrat* on the one hand and the European Parliament (EP) on the other in the democratic control of EU politics by taking the GCC's own standard of German citizens' ability to hold decision-makers accountable and to exert influence on the (EU) policy agenda (Art. 38 GG) as a benchmark. It is argued

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1 Heribert Prantl, 'Europäische Sternstunde', *Sueddeutsche Zeitung*, 30 June 2009.

2 Joschka Fischer, 'Ein nationaler Riegel', *Die Zeit*, 9 January 2009.



below that the GCC's refusal to acknowledge the EP's potential to contribute independently to the political accountability of EU decision-makers vis-à-vis German citizens is not convincing because, in its interpretation of the EU and the EP, the GCC relies on a nation-state analogy which does not follow from the institutional reality created by the Lisbon Treaty. By drawing on this nation-state analogy, the GCC holds the EP up to standards it cannot meet. At the same time, by exclusively relying on institutional remedies and ignoring the behavioural and political dimension, the GCC overestimates the current potential of the *Bundestag* to hold the German government accountable. The 'politics' dimension of accountability<sup>3</sup>, however, is of core importance. Only if decision-makers report vis-à-vis the public and the parliament, thereby allowing citizens to form an idea about what the EU is and does and an opinion and preferences about what EU decision-makers should do with the power delegated to them, can citizens use their electoral powers in a meaningful way to punish the government for EU actions that are not in line with their respective preferences. As a consequence, the remedies to increase the accountability and democratic legitimacy of the EU proposed by the GCC in the Lisbon ruling are hardly effective.

## **2. Parliaments (and Political Parties) in the GCC Lisbon Ruling**

The GCC's premise that German citizens need to be able to hold their representatives accountable for their decisions and exert influence on the broad goals of future policies which strongly affect their lives<sup>4</sup> will hardly provoke any opposition from students of democracy<sup>5</sup>. Yet, what has been universally accepted for democratic nation states is a matter of contestation for the EU. While it has been argued that the EU can claim legitimacy for its decisions due to the quality of its outputs<sup>6</sup> or the extensive domestic checks which member-state executives as the main domestic actors in EU politics face<sup>7</sup>, the number

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3 Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework', *European Law Journal* 13 (2007), 447-468.

4 GCC, 2 BvE 2/08, paras 210-215, 246-247, 268-272.

5 Thomas Christiano, *The rule of the many: fundamental issues in democratic theory*, Boulder 1996.

6 Fritz Scharpf, *Regieren in Europa. Effektiv und demokratisch?*, Frankfurt 1999; Giandomenico Majone, 'The Credibility Crisis of Community Regulation', *Journal of Common Market Studies* 38 (2000), 273-302.

7 Andrew Moravcsik, 'In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union', *Journal of Business* 40 (2002), 603-624.

of those arguing for more direct democratic control of EU politics by EU citizens has constantly risen during the last years<sup>8</sup>. The perception of a need for citizens to hold national and European EU decision-makers more directly accountable also seems to be shared by member state governments, which consider the EP an adequate institutional forum for this purpose: In successive treaty revisions starting with the Single European Act in 1986 they extended the EP's powers in a number of areas, most importantly perhaps by making it a co-equal legislator in legislative decisions taken through the co-decision procedure<sup>9</sup>. The Lisbon Treaty continues the institutional strengthening of the EP and at the same time extends the parliamentarization of the EU to the national level by giving national parliaments a more prominent, if mostly consultative, role in EU politics (e.g. Article 12 EUV, Protocols 1 & 2).

In its Lisbon ruling the GCC accords member state governments the prime role in governing the EU and national parliaments the central role in holding executive actors taking EU decisions accountable. The EP is assigned a supplementary role.<sup>10</sup> The GCC's reasoning thereby departs from governments' strategy of increasing EU decision-makers direct democratic accountability – and consequently the legitimacy of EU politics and policies – through extending the powers of the EP. The latter is, according to the GCC, a consequence of the lack of a European people with a shared identity, which expresses its political will through fair and equal elections, in which equality refers to the equal (counting) value of each citizen's vote.<sup>11</sup> Equality certainly is a core criterion for designing electoral institutions in democratic nation states. A common identity, however, is no precondition to hold EU decision-makers accountable. More important is the ability of citizens to learn about EU political elites' decision-making behaviour and the political rationale behind it. This again allows citizens to cast their vote in national as well as European Parliament elections in a meaningful way, i.e. holding office holders accountable for past behaviour and exerting influence on the future policy agenda<sup>12</sup>.

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8 Andreas Follesdal/Simon Hix, 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik', *Journal of Common Market Studies* 44 (2006), 533-562; Fritz W. Scharpf, 'Legitimacy in the multilevel European polity', *European Political Science Review* 1 (2009), 173-204.

9 Berthold Rittberger, *Building Europe's parliament: democratic representation beyond the nation-state*, Oxford 2005; Frank Schimmelfennig/Berthold Rittberger/Alexander Bürgin/Guido Schweltnus, 'Conditions for EU constitutionalization: a qualitative comparative analysis', *Journal of European Public Policy* 13 (2006), 1168-1189.

10 GCC, para 262.

11 GCC, paras. 279-280, 285-286.

12 Christiano, note 5 above.

In principle, the European Parliament provides an institutional venue which could fulfil exactly this function of creating public awareness of EU decisions. Moreover, national parliaments and the EP are no competitors in this regard. Both can help to create public awareness and increase the accountability of EU decision-makers and the EP can even be considered to be in a privileged position as its members are the only representatives of an EU institution who are directly elected by member-state citizens and thus also directly accountable for their behaviour in EU politics. The EU – at least currently – is not a full-blown state but rather a strongly institutionalized form of inter-state cooperation with considerable powers delegated to supranational institutions. In such an institutional setting voting equality is not a necessary condition for an institution such as the EP to be able to create public awareness of EU politics, thereby allowing citizens in different member states to learn about EU policies that might affect their personal well-being and provide them with means to hold decision-makers at the EU level directly accountable. By discussing the EP's institutional quality and EU democracy enhancing potential in analogy to nation-state parliaments, the GCC gives away these potentials.

Yet, when discussing the EP's potential to increase the democratic accountability of EU decision-makers it should be noted that EU politics lacks a meaningful discourse among political leaders on the future direction of EU policies. This is true for EU politics in general<sup>13</sup> but also holds for interactions in the EP. Although voting in this institution is structured ideologically, regularly pitting European Parliamentarians from the left against those of the right<sup>14</sup>, the EP hardly manages to ignite public political debate. Moreover, EP election campaigns are run on national topics and citizens' votes therefore cannot provide direction for EU policies<sup>15</sup>. Thus, while successive treaty revisions made the EP an institutional powerhouse, it is failing as regards the creation of a meaningful debate on EU politics which could inform citizens in member states. From such a perspective, the problem is not that the EP lacks a people with a uniform, i.e. European, identity allowing it to contribute to the legitimacy of EU as stated by the GCC and discussed as necessary for the losers of

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13 Stefano Bartolini, *Restructuring Europe. Centre formation, system building and political structuring between the nation-state and the European Union*, Oxford 2005; Peter Mair, 'Political Opposition and the European Union', *Government and Opposition* 42 (2007), 1-17.

14 Simon Hix/Abdul Noury/Gérard Roland, *Democratic Politics in the European Parliament*, Cambridge 2007.

15 Oskar Niedermayer, 'Europa als Randthema: Der Wahlkampf und die Wahlkampfstrategien der Parteien', in Oskar Niedermayer/Hermann Schmitt (eds), *Europawahl 2004*, Wiesbaden 2005, 40-46; Hermann Schmitt, 'The European Parliament elections of June 2004: Still second-order?', *West European Politics* 28 (2005), 650-679.

majority decisions to accept decisions by the majority<sup>16</sup>. Yet, currently citizens do accept majority decisions and are at the same time unable to exert their EP voting rights in a meaningful way. The EP rather suffers from a lack of politics resonating with the domestic publics in member states allowing citizens to form preferences on EU policies that make EP voting meaningful and effective in providing political accountability of EU decision-makers. To be sure: in order to be able to make members of the EP's political efforts resonate in the German public it not only needs increased efforts by MEPs to make themselves heard, but also relies on the willingness of German media and political elites communicating and engaging with these.

Are there any signs that the *Bundestag* will be able to fulfil the strong expectations the GCC and a number of commentators put on it in providing checks on the actions of the German government in EU politics? Article 23 of the German Basic Law provides the *Bundestag* and *Bundesrat* with information and consultation rights vis-à-vis the government in EU political affairs. In addition, Art. 45 GG established a European affairs committee, dealing with Treaty issues, while other policy issues are dealt with by the specialized committee competent in the respective policy area<sup>17</sup>. The scarce systematic empirical research on how and to which effect these consultation and information rights vis-à-vis governments are exercised by members of the *Bundestag* indicates that MPs are mostly informally active within their parliamentary parties<sup>18</sup> to influence the government's EU positions and decisions. Yet, the overall power of the *Bundestag* to hold German ministers sitting in the Council accountable is considered to be relatively weak<sup>19</sup>. In addition, while EU-related politicking in the German *Bundestag*, in case it takes place at all, is primarily of an informal and non-transparent nature, it is largely absent from electoral competition. While German political parties systematically integrate the EU in their general ideological profile<sup>20</sup> and the prominence of the EU as a topic in national election campaigns has increased since the 1970s, EU issues still made up only about 3 percent of German political parties' issue-specific statements in their national (*Bundestag*) election campaigns during the 1990s<sup>21</sup>. As a consequence, German voters are

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16 Scharpf, note 6 above, 17-19.

17 Katrin Auel/Arthur Benz, 'The Politics of Adaptation: The Europeanisation of National Parliamentary Systems', *Journal of Legislative Studies* 11 (2005), 372-393, 385.

18 Ibidem, 389.

19 Thomas Saalfeld, 'Deliberate delegation or abdication? Government backbenchers, ministers and European legislation', *The Journal of Legislative Studies* 11/3 (2005), 343-371, 360.

20 Gary Marks/Carole Wilson, 'The Past in the Present: A Cleavage Theory of Party Response to European Integration', *British Journal of Political Science* 30 (2000), 433-459.

21 Hanspeter Kriesi, 'The Role of European Integration in National Election Campaigns',

hardly informed about EU politics – and governments that come out of these parliamentary elections can hardly be said to hold anything similar to an EU mandate. It is therefore hard to see how the *Bundestag* can live up to securing the popular democratic control of the German government in EU affairs which the GCC demanded in its Lisbon ruling.

Accordingly, when taking its own standards of accountability and citizens' influence on the general political direction (Art. 38 and 20 GG) as a benchmark, the GCC's reasoning is not convincing. Given the insufficient public political treatment, i.e. politicization, of EU issues by German party political elites, it is hard to see how German citizens can be considered to hold their parliamentary representatives, and thus indirectly also the German government, accountable for EU politics. The GCC circumvents this discussion by claiming that the EU leaves ample space for German legislators to shape policies in what the GCC defines as 'core' fields of (German) state activity – criminal law, war and peace, public expenditures and taxation, welfare, culture and religion<sup>22</sup>. While these claims allow the GCC to refrain from demanding a stronger and more direct democratic control of EU decision-makers and their decisions, they are hardly substantiated. Instead they seem to ignore that already today, EU decisions strongly affect the ability of member states to decide on the organization of their welfare and industrial-relations regimes, which directly affect citizens' welfare in EU member states and increasingly provoke open political contestation of EU decisions<sup>23</sup>.

### **3. (Political) Shortcomings of the GCC Legal Reasoning and the Limits of a Judicial Cure for the EU's Democratic Deficiencies**

Two main criticisms have been raised against the arguments laid out by the GCC in its Lisbon ruling as regards German national parliaments' and the European Parliament's potential to hold EU decision-makers accountable and increase the democratic legitimacy of EU politics: First, its principled refusal of the EP's (not yet realized) potential to provide citizens with a means to hold EU decision-makers directly accountable, thereby directly contributing to the

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European Union Politics 8 (2007), 83-108, 95.

22 For a criticism on the GCC's ambition to define the limits of Germany's integration into the EU, see Christoph Möllers, 'The German Constitutional Court says "Ja zu Deutschland"', German Law Journal 10/8 (2009), 1241-1257, 1249 ff.

23 Martin Höpner/Armin Schäfer, 'A New Phase of European Integration. Organized Capitalism in Post-Ricardian Europe', MPIfG Discussion Paper 4 (2007).

legitimacy of EU politics. Second, the GCC's overestimation of the role the *Bundestag* can and will play in shaping EU policies and the effectiveness of (today's) elections and public discourse in this process. Closely related to the last point, the GCC's underestimation and non-substantive argumentation of the (high) degree to which member states are still sovereign in many substantive policy areas was criticized. Given that EU decisions, both legislative and judicial, increasingly provoke political opposition, the accountability of EU decision-makers and the democratic political legitimation of EU decisions not only is of theoretical interest but might also be of political relevance with respect to securing the EU's capacity to act and the compliance of member state governments.

Given the strong economic, political and societal differences between the member states of the EU of 27 and the resulting differential welfare effects on citizens in different member states, an EU-wide debate that engages citizens in all member states simultaneously in a discussion on substantive EU policy issues seems highly unlikely<sup>24</sup> – even after, as has been suggested, some institutional engineering such as the direct election of the Commission President<sup>25</sup>. To be taken up by the national media and to allow citizens to relate EU issues to their own political stakes and welfare, a meaningful and viable political contest on EU politics must rather take place at the member-state level. Yet, as the discussion above showed, German party political elites so far are reluctant to make the EU a topic of their political contestation. This might be a deliberate strategy by Germany's integration-friendly parties – CDU, FDP, Greens and SPD – in order to avoid allowing parties which take a critical stance on European integration, such as Die Linke, to reap electoral benefits from contesting on the EU. As a consequence, EU politics still largely operates at the (non-public) elite level and, although the gap might have been narrowed<sup>26</sup>, member-states citizens see the EU more critically than (party) political elites<sup>27</sup>

How then might political contestation on EU issues be ignited given that German party political elites seem reluctant to engage in it? German interest

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24 Adam P. Brinegar/Seth K. Jolly/Herbert Kitschelt, 'Varieties of capitalism and political divides over European integration', in Gary Marks/Marco R. Steenbergen (eds), *European Integration and Political Conflict*, Cambridge 2004, 62-89.

25 Follesdal and Hix, note 8 above.

26 Marco R. Steenbergen/Erica Edwards/Catherine E. De Vries, 'Who's Cueing Whom? Mass-Elite Linkages and the Future of European Integration', *European Union Politics* 8 (2007), 13-35.

27 Cees Van der Eijk/Mark N. Franklin, 'Potential for contestation on European matters at national elections in Europe', in Gary Marks/Marco R. Steenbergen (eds), *European Integration and Political Conflict*, Cambridge 2004, 32-50.

groups will continue to mobilize domestically on an issue-specific basis trying to influence EU policies relevant for their constituencies, thus creating public awareness to which political parties might then be forced to react – as was the case in the Services (‘Bolkestein’) Directive recently. Moreover, radical parties might discover the EU as an issue for which there is a considerable electoral potential, thus forcing mainstream parties to take a stand on EU issues<sup>28</sup> – something we have witnessed in other EU countries<sup>29</sup>. Finally, the media itself might get more attentive to the EU and ask political elites for their perspective on and position in EU politics. For the time being, German citizens must live with the fact that they are hardly able to hold their representatives accountable for their EU actions and decisions. So far this ‘permissive consensus’ allowed political elites to proceed with European integration without explicit public consent. Yet, there are good arguments that this period is over, given the extent to which the EU interferes with member states’ policies<sup>30</sup>. It might be the politically most dissatisfying aspect of the GCC’s Lisbon ruling that its demand for a change of the German *Ausweitungsgesetz*, which was adopted by the *Bundestag* and *Bundesrat* without significant public recognition, created the illusion of German EU politics that are democratically accountable. This, however, hardly fits political reality.

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28 Ibidem.

29 Hanspeter Kriesi/Edgar Grande/Romain Lachat/Martin Dolezal/Simon Bornschier/Timotheos Frey, *West European Politics in the Age of Globalization*, Cambridge 2008.

30 Liesbet Hooghe/Gary Marks, ‘A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus’, *British Journal of Political Science* 39 (2009), 1-23.

# Judicial Sovereignty Unlimited? A Critique of the German Federal Constitutional Court's Ruling on the Lisbon Treaty

Andreas Fischer-Lescano

The European idea is discredited. A broad societal alliance perceives Europe as a bastion of neoliberalism, militarism, bureaucracy. And indeed, in Europe's name armed forces combat in the operation Atalanta piracy off the Horn of Africa and turn themselves into an army of intervention; in Europe's name the External Border Agency FRONTEX erects a fortress causing thousands to drown in the Mediterranean; in Europe's name the European Court of Justice (ECJ) established the primacy in application of supranational law, whose very formation contradicts democratic ideas and whose substance more than once violates our sense of justice: the *effet utile* of European law is also an *effet* neoliberal.<sup>1</sup> One is well-advised not to accept this development and to scandalise when the United State Apparatuses of Europe perceive democratic participation rights, in the form of referenda, as operational hazards, when they turn European solidarity into a mere redistributive bottom-to-top mechanism, and when they initiate competition for ever-lower wages among Member States.

Paradoxically, national coalitions not only in Germany now argue that Europe becomes more social, pacifist and democratic not by reshaping the European process but by opposing it. This state-monopolist resistance movement ranges in German politics from Peter Gauweiler's CSU to Diether Dehm's LINKE, from the Max Planck Institute of Fritz Scharpf to the ordoliberal think tank of the Freiburg School *à la* Roman Herzog and Lüder Gerken (CEP). For them, the remedy against the increasing independence of European state apparatuses is to replace European political contexts with reestablished national politics. After the decision of the Federal Constitutional Court in June 2009, this *unitas oppositorum* proclaimed itself stage winner: it argued that in its Lisbon verdict the German Constitutional Court (GCC) had put its national foot down, dressed in its 'Yes, but' concerning the Lisbon Treaty.

However, those celebrating the Lisbon ruling as a political victory of a state that counters European interventions with a stern '*L'Etat c'est moi*' and that isolates the German welfare state from asocial European developments base –

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1 See Christoph U. Schmid, 'Vom *effet utile* zum *effet* neoliberal. Eine Kritik des neuen judiziellen Expansionismus des Europäischen Gerichtshofs', in Andreas Fischer-Lescano/Florian Rödl/Christoph Schmid (eds), *Europäische Gesellschaftsverfassung. Zur Konstitutionalisierung sozialer Demokratie in Europa*. Schriftenreihe des Zentrums für Europäische Rechtspolitik, Bd. 53, Baden-Baden 2009, 33-54.



in the century of the transnational constellation – their democratic hopes on the ‘primary spaces’ (as the GCC calls them<sup>2</sup>) of national communities of fate. They misread the ruling in a twofold way: First and in contrast to the interpretation of the nationalist critique of Europe, the GCC did not foreclose the perspective of a European federal state but requires for the latter the German people to express directly their intention, hence it requires a referendum on Europe.<sup>3</sup> Second, the Karlsruhe ruling cannot be smooth talked into a success of emancipatory politics for a social and radically democratic Europe. To the contrary, a European legal politics geared towards the emancipatory ideal has to recognise that the Court is not interested in the development of a social Europe and that it has not made more likely the realisation of social and democratic principles in Europe.

An emancipatory legal politics for Europe has to take account of both dimensions of the ruling, in order to avoid following the little complex equations: ECJ = guardian of neoliberalism, *BVerfG* = guardian of the welfare state. There is need to come to a European policy that involves itself into the struggle for European law from the inside of the European legal form and not from a national outside. A simple ‘back to the nation state’ fails to recognise that European law is in many aspects more liberal than many national laws, for instance, when it comes to issues of migration in general and the right for family reunification of third country nationals in particular. The ECJ has, for example, strengthened family rights in a number of decisions vis-à-vis national authorities willing to expel.<sup>4</sup> Also in the area of anti-discrimination and trans-European social benefits for Union citizens, the Court is quite progressive.<sup>5</sup>

## 1. The Restriction of Social Rights

European law is not simply neoliberal devil’s work, but like all law part of a dialectical process; it is both a stronghold of the hegemonic bloc and a bastion of the subalterns. An emancipatory legal politics in Europe needs to engage into these ‘struggles for law’ and to increase the responsiveness of European law for the social question in the postnational constellation. In essence, the Karlsruhe ruling contributes nothing of value to this debate. The Court has certainly shown the formal will to power, at the same time it made also clear in the justifying passages on human dignity and social rights that it does not in-

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2 GCC, para 360.

3 GCC, paras 217, 228.

4 ECJ, *Carpenter* (11.7.2002), C-60/60.

5 ECJ, *Mangold* (22.11.2005), C-144/04.

tend to defend social rights against a European race to the bottom.

This becomes already apparent in the part of the ruling dealing with admissibility. Some of the complainants had in their pleadings, referring to the decision of the ECJ in the *Laval* case, stressed the danger that in the European context human dignity was not safeguarded from being balanced. Human dignity is the starting point for a whole range of fundamental rights to social subsistence and to the self-constitution of individuals; hence, it is the participatory fundamental right par excellence and, therefore, the expression of the co-originality of the rights to existence and participation.

It is surprising with how little effort the Court justified the rejection of those claims as unsubstantiated. In the *Laval* ruling of the ECJ, the scandalous sentence can be found that ‘the exercise of the fundamental rights at issue, that is, freedom of expression and freedom of assembly and respect for human dignity, respectively, (...) must be reconciled with the requirements relating to rights protected under the Treaty [for instance, the fundamental rights] and in accordance with the principle of proportionality’.<sup>6</sup> The Lisbon Treaty even increases the risk and the reality of the dependence on human rights in the European context, as Article 52 of the European Charter of Fundamental Rights, which comes into force with the Lisbon Treaty, establishes in difference to German law no differentiated system of fundamental rights guaranteed by simple or qualified provision or even unconditionally; rather, it makes the exercise of all fundamental rights mentioned in the Charter subject to legal approval according to which restrictions can be imposed ‘if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others’.

One would have hoped that the Constitutional Court had more to say about the scandal of weighing up human dignity as a human right than its reference that it remains reserved to future proceedings to determine whether and to what extent a reduced protection of fundamental rights at the European level can justifiably be criticised at all, and which requirements such complaints have to fulfil.<sup>7</sup> This reference to an uncertain future shows that the Court pursued in its ruling not so much an emancipatory concern than rather an interest in its institutional self-preservation, and that it is therefore not ready to accept unconditionally the guiding effect of ECJ decisions. In a later passage the Constitutional Court becomes even clearer in this matter, and announces that in future it intends to examine whether the Union respects the principle of subsidiarity, whether European legal acts remain within the confines of those sovereign

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<sup>6</sup> ECJ, C-341/05, 8.12.2007, *Laval*, para 94.

<sup>7</sup> GCC, para 189.

rights granted by conferral, and whether the untouchable kernel of the German Basic Law according to Article 23(1)(3) in conjunction with Article 79(3) remains preserved.<sup>8</sup> More than this formal will to power can however not be distilled from the ruling: one wonders, why national citizens should actually have an interest in a national constitutional court, if the latter thinks it not worth mentioning the infringement of the most inviolable goods of all, namely human dignity, made apparent in the reasoning for one of its decisions?

The GCC provides the democratic idea in Europe only with stones instead of bread. It adopts a formal-institutional approach and unties the central nexus of social and democratic rights, although also in the Basic Law ‘the position of the welfare state idea in the legal principle of the democratic and social rule of law is geared towards the extension of the substantive constitutional idea of democracy to the economic and social order as well as the cultural life’.<sup>9</sup> This is exactly the crux of a decision that seeks to tackle the devil of neoliberal globalisation with the *Beelzebub* of (nation-)state institutions and thereby fails adequately to address the social question: how can, between Karlsruhe and Berlin, the societal spaces of autonomy usurped by an unfettered global economy be re-established in an emancipatory vein? In this matter central for social democracy, the Constitutional Court retreats to the argument that it is not evident that ‘the Member States are deprived of the right, and the practical possibilities of action, to take conceptual decisions regarding systems of social security and other social policy and labour market policy decisions in their democratic primary areas’.<sup>10</sup> This position ignores the interweaving of European welfare systems, the conditions for the possibility of the constitutionalisation of social democracy in Europe and democratic forms of participation that transcend the ideology of the identity of legal authors and addressees in national ‘primary spaces’ (e.g., the rights to strike, freedom of communication, etc.).

How little the Court was susceptible to democratic forms of participation in the ‘secondary spaces’ beyond the state is reflected in its apologetic claim that the social qualities of Europe become apparent as the ECJ ‘even established the existence of a European fundamental right to strike’.<sup>11</sup> However, the Con-

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8 GCC, para 240.

9 Wolfgang Abendroth, ‘Zum Begriff des demokratischen und sozialen Rechtsstaates im Grundgesetz der Bundesrepublik Deutschland’, in Alfred Herrmann (ed), *Aus Geschichte und Politik. Festschrift für Ludwig Bergstraesser*, Düsseldorf 1954, 279 ff.; see also Andreas Fischer-Lescano/Oliver Eberl, ‘Der Kampf um ein soziales und demokratisches Recht. Zum 100. Geburtstag von Wolfgang Abendroth’, in *Blätter für deutsche und internationale Politik* 51 (5/2006), 577-585.

10 GCC, para 399.

11 GCC, para 398.

stitutional Court remains silent about the fact that the ECJ made this right to strike immediately subject to the reservation of consideration of fundamental freedoms in the above-quoted Laval ruling and initiated in the field of social rights a downward spiral in European law. A court seriously interested in democratic and fundamental social issues would have started here and would have had to offer substantive guidance for a way out of the debris field of social democracy in Europe.

The logic of this decision does not strengthen the welfare state as a precondition for national democracy, to the contrary it rather offers a reading that takes trans-European structures of solidarity<sup>12</sup> as an imposition and seeks to cement Europe as an ‘economic administration union’ by invoking national cultures and special paths (*Sonderwege*). It seeks to establish Europe as an interest group of technocratic managerialism, which rejects the horizontal effect of fundamental rights (and hence the legal form of the socialisation of private actors); which rejects when the ECJ establishes a broad interpretation of the European anti-discrimination law in the Mangold case; which rejects the fact that migration and family rights are strengthened by European law. If this point of view prevails, the economic winners of Europeanisation are able to protect themselves against losses in European law – as the controversy surrounding the Mangold case indicates.<sup>13</sup>

## **2. Parliamentary Sham-Legitimation**

The guiding principle of the ruling is the meticulous quest for national checkpoints to strengthen national structures of legitimacy. In its ruling, the Federal Constitutional Court sees itself not only as the guardian of the constitution but also of the democratic participation rights in Europe and postulates that even after Lisbon ‘the *Bundestag* as the body of representation of the German people [has to remain] the focal point of an interweaved democratic system’.<sup>14</sup>

In the *Bundestag*, all political groups welcomed this point. The reading of the legislative package to implement the decision turned into a contest in parliamentary participation strengthening – and that although the *Bundestag* had not only passed the accompanying law objected to by the Constitutional Court, but had also stressed throughout proceedings in the Constitutional Court that the com-

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12 See for a reconceptualization Hauke Brunkhorst, *Solidarity. From Civic Friendship to a Global Legal Community*, Cambridge 2005.

13 Lüder Gerken/Volker Rieble/Günther H. Roth/Torsten Stein/Rudolf Streinz, ‘Mangold’ als ausbrechender Rechtsakt, München 2009.

14 GCC, para 277.

plaints were unfounded. That the Court called on the *Bundestag* against its resistance to accept its democratic duty begs the question whether the German legislative body is in general structurally capable, willing and able to meet the Herculean task of democratising poly-centric European governance.

Here scepticism is in place. The notion, apparent in the verdict, that in a differentiated world society the solution of problems of neoliberal globalisation can essentially be transferred to a national parliament cooperating with a constitutional court is a phantasmagoria, with which the Constitutional Court fights against processes of transnationalisation and in which it imagines a national ‘primary spaces’<sup>15</sup> as a room for activity.

It becomes obvious that this approach falls short, when one turns to a central field that the Constitutional Court wants to shield from supranationalisation: the constitutive requirement of parliamentary approval concerning defence. The latter is argued to be ‘integration-resistant’.<sup>16</sup> It is a chimera to think that such a parliamentary patriotism could pacify European and global governance relations. The reservation of parliament has in the area of defence definitely a function of responsibility ascription; this is why one should work towards also involving the European Parliament in military decision-making in a constitutive way. But for the pacification of a nation at war, the parliamentary reservation is rather part of the problem than the solution: a parliamentary oversight of NATO operations and of the development of the NATO Treaty is basically non-existent. Parliamentarisation has brought no observable, effective control of military operations. The German *Bundestag* has yet in a single case to deny consent to a governmental request for posting. The humanitarian intervention in Kosovo, the military campaign against piracy off the Horn of Africa, the Operation Enduring Freedom as alleged enduring self-defence – the German *Bundestag* has provided all these missions with a sham legitimisation, despite serious indications that these missions are not in conformity with international law and the German constitution.

A legal oversight of operations and decisions is lacking everywhere. The Federal Constitutional Court examines only formalistically, whether a parliamentary decision exists.<sup>17</sup> Thus far the Court has in no case adequately ad-

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15 GCC, para 360.

16 GCC, para 235, the German word ‘integrationsfest’ is not directly translated into the English version of the judgment.

17 Andreas Fischer-Lescano, ‘Bundeswehr als globaler Sicherheitsdienstleister? Grenzen der Zustimmungsfähigkeit von bewaffneten Streitkräfteeinsätzen’, in Andreas Fischer-Lescano/Hans-Peter Gasser/Thilo Marauhn/Natalino Ronzitti (eds), *Frieden in Freiheit – Peace in liberty – Paix en liberté. Festschrift für Michael Bothe zum 70. Geburtstag*, Baden-Baden 2008, 81-101.

addressed the question whether such missions comply with international law. This is exactly the point at which this formal-democratic logic has to be broken. It should be replaced by a strategy to empower the ECJ, the European Court of Human Rights, the International Court of Justice (ICJ) and other national courts – such as Italian courts in the case of actions for damages against Germany by victims of National Socialism – to restrict national sovereignty and strengthen individual victim's rights to compensation and legal protection under international law vis-à-vis 'sovereign' nation-states.

The Germany currently sues before the ICJ, arguing that the Italian rulings violate German sovereignty. The action is just as scandalous as the fact that Germany accepts the compulsory jurisdiction of the ICJ, but in matters of military operations, like the granting of overflight rights, etc., declared a provision of sovereignty and hence a jurisdictional exception.<sup>18</sup> Such sovereignty ideologies have to be fiercely criticised. The increase of interdependence through internationalisation and not re-nationalisation has to be the program of legal politics for a social Europe.

### **3. Conclusion: Prospects for Radical Democracy in Europe**

Radical democracy in Europe must strengthen also those democratic and legal procedures beyond national parliaments and replace projects of national elite rule with a legal politics for Europe, which emphasises the central nexus of social and democratic rights. With Wolfgang Abendroth we have to insist that the democratic and social idea must be designed to be extendable to the entire – and this means today also the European and global – 'economic and social order as well as the cultural life'.<sup>19</sup>

To create the European process in a radically democratic fashion and to strengthen forms of participation beyond the nation-state is no small challenge. If one wants to accept the struggle for democratic and social rights in Europe, national constitutional courts must not be converted into undertakers of the European idea, but they have to be taken seriously as arenas in a legal-political struggle for a social and democratic European law in the network of transnational courts.

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18 See the declaration of the German foreign minister, 'Declaration recognizing as compulsory the jurisdiction of the ICJ', 30.4.2008 (<[http://untreaty.un.org/English/CNs/2008/301\\_400/357E.pdf](http://untreaty.un.org/English/CNs/2008/301_400/357E.pdf)>); see also BT-Drs. 16/9218; for a critique, see Diether Deise-roth, 'Kriegseinsätze ohne völkerrechtliche Kontrolle. Doppelter deutscher Militärvorbehalt gegenüber dem IGH', in Grundrechtreport, Frankfurt am Main 2009, 209-213.

19 Abendroth, note 9 above.

A social and radically democratic Europe cannot be realized by the accumulation of national people's spirits, or national and supranational citizenships, which are based on the exclusion of non-citizens, but by the establishing of an inclusive public sphere that transcends statist exclusions. To strengthen the social preconditions of this transnational public sphere, to make enforceable its rights to strike, to assemble, to demonstrate, to resist, to participate, to be compensated, rights to be protected from the state, etc., and to make them effective before European courts, the project of an emancipatory legal politics for Europe aims to make the European social and economic order the subject of the democratic process.

# More Democracy in the European Union?! Mixed Messages from the German Lisbon Ruling

*Ulrike Liebert*

## 1. The GCC Lisbon Ruling and the Issue of Democratic Legitimacy Beyond the State

Although the Treaty of Lisbon (EUT-Lisbon) aims at enhancing the democratic legitimacy of the Union<sup>1</sup>, by its Lisbon ruling the German Constitutional Court (GCC) – traditionally self-defined as the watchdog of Germany's 'guarded democracy' – has only reluctantly embraced the most recent EU treaty reform.<sup>2</sup> As regards the provisions on democracy included in the new treaty, the GCC's judgement conveys rather mixed messages. Joseph Weiler, a more 'seasoned' observer, notes that unsurprisingly, the GCC did not 'derail the process of European integration in so important a case', but like a 'dog that barks but does not bite' accompanied its Lisbon ruling by an inconsistent reasoning with strengths, shortcomings and also contradictions: 'A decision with lights and shadows, some conflicting tendencies, some painful displays of shallowness and lack of political imagination, and some veritable soaring passages and profound reflection'.<sup>3</sup> Turned quickly into a catalyst of contested transna-

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- 1 The Laeken Declaration on the Future of the European Union of 2001 had placed 'more democracy, transparency and efficiency in the European Union' on the banner of treaty reform, see Bulletin EU 12-2001, I.27; the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (2007/C 306/01), Official Journal of the European Union C 306, title II., Art. 8 A, B and C establishes a new title with provisions on democratic principles for the activities and functions of the Union, including citizens' equality, representative democracy, participatory and consultation mechanisms, such as the citizens' legislative initiative, and the role of National Parliaments. For an analysis of the chapter on the democratic life in the EU's Constitutional Treaty, see Ulrike Liebert, 'Der Verfassungsvertrag: Ein Fortschritt für die demokratische Legitimität in der Europäischen Union?', in Mathias Jopp/Saskia Matl (eds), *Der Vertrag über eine Verfassung für Europa. Analysen zur Konstitutionalisierung der EU*, Baden-Baden 2005, 383-410.
  - 2 See BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. (1-421), <[http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html)>.
  - 3 Joseph H. Weiler, 'Editorial: The "Lisbon Urteil" and the Fast Food Culture', *European Journal of International Law* 20(3) (October 22, 2009). <<http://www.ejil.org/pdfs/20/3/1857.pdf>>.



tional public debate<sup>4</sup>, the GCC judgement has been praised or, conversely, criticised, on the one hand, for taking popular sovereignty and democracy seriously<sup>5</sup>, for erecting the Basic Law as an ‘integration barrier’ against the building of a EU state<sup>6</sup>, for placing German EU politics and the European Court of Justice under ‘total control’<sup>7</sup>, for interpreting the Basic Law lopsidedly in favour of German sovereignty, and even for sending German EU politics and law down a dead-end street.<sup>8</sup> On the other hand, the Lisbon ruling clearly endorses the Lisbon Treaty provisions for expanding majority decision-making, and for empowering the European Parliament by co-decision-making, among others. How, then, does one make sense of this ‘mixed bag’ that the GCC offers for the puzzle of democratic legitimacy in the EU?

In order to answer this question for the Lisbon ruling, I suggest reading the German Court ruling as part of the larger debate about whether domestic democracy is necessarily diminished or whether it can also be reconciled with multi- or supranational organisations, such as the EU. Likewise, I propose understanding the Lisbon judgement as an outcome of discursive struggles – not only among litigants and defendants but also among the judges of the Second Senate and the academic and intellectual positions by which they are informed. In particular, I argue that the GCC’s Lisbon judgement contains contrasting discursive strands that can be best understood through the lens of a dialogue

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4 Michael Bothe, ‘The Judgement of the German Federal Constitutional Court Regarding the Constitutionality of the Lisbon Treaty’, *Istituto Affari Internazionali* (IAI0920); Daniel Halberstam and Christoph Möllers, ‘The German Constitutional Court says “Ja zu Deutschland!”’, *German Law Journal* 10(8) (August 2009); Alfred Grosser, ‘The Federal Constitutional Court’s Lisbon Case: Germany’s “Sonderweg”: An Outsider’s Perspective’, *idem*.

5 K.F.Gärditz/C.Hillgruber, ‘Volkssouveränität und Demokratie ernst genommen – Zum Lissabon-Urteil des BVerfG’, *JuristenZeitung* (2009), 872 ff.

6 Dieter Grimm, ‘Das Grundgesetz als Riegel vor einer Verstaatlichung der Europäischen Union’, *Der Staat* (4/2009, forthcoming); Peter Becker/Andreas Maurer, ‘Deutsche Integrationsbremsen. Folgen und Gefahren des Karlsruher Urteils für Deutschland und die EU’, *Stiftung Wissenschaft und Politik, SWP-Aktuell* 41 (July 2009).

7 See Christian Calliess, ‘Unter Karlsruher Totalaufsicht’, *FAZ*, 27 August 2009, 8.

8 Carl Otto Lenz, ‘Ausbrechender Rechtsakt. Das Urteil des Bundesverfassungsgerichts zum EU-Vertrag von Lissabon legt das integrationsoffene Grundgesetz in einer einseitig restriktiven Weise aus. Das Gericht begibt sich in eine politische Rolle und behindert die Schaffung eines vereinten Europa’, *FAZ*, 8 August 2009, 7; Armin von Bogdandy, ‘Prinzipien der Rechtsfortbildung im europäischen Rechtsraum’, *NJW* 1-2 (2010), 1-5; W. Frenz, ‘Unanwendbares Europarecht nach Maßgabe des BVerfG?’, *EWS* (2009), 297 ff.; Thomas Oppermann, ‘Den Musterknaben ins Bremserhäuschen! – Bundesverfassungsgericht und Lissabon-Vertrag’, *EuZW* (2009), 473; Christoph Schönberger, ‘Lisbon in Karlsruhe: Maastricht’s Epigones at Sea’, *German Law Journal* (2009), 1201 ff.

between competing models for reconstituting democracy in Europe.<sup>9</sup> In contrast to the two prevailing interpretations of the Lisbon judgement – the national sovereignist and the anti-supranational statist – I put forward a third, ‘consequentialist democratic’ reading of the GCC ruling regarding the legitimacy of the EU. This aims at assessing the legitimacy of the supranational Union of states in terms of the impacts it has for the quality of domestic democracies.<sup>10</sup> In the following I will develop this argument in three steps, by inspecting the Lisbon ruling more closely from the angles, first, of ‘delegating national democracy’, second, of a supranational federal republic, and, third, of a confederation of sovereign democracies, before drawing a synthesis and conclusion.

## **2. Cherishing ‘Delegating Democracy’ in a Europe of Sovereign States**

An interpretation of the German Lisbon judgement from a sovereignist angle offers strong proof for the GCC’s stance in favour of a European legal order conceived of as an international treaty, based on ‘delegated authority’ and premised on national sovereignty:

- supporting the view that the states are to remain the ‘masters of the Treaties’,<sup>11</sup> the GCC exhibits a clear sympathy for an international treaty rather than a European constitution;
- premised on the member governments’ delegation of legal and bureaucratic competences to the EU, it links the authority of the EU to the ‘principle of conferral’, that is a ‘mechanism of protection to preserve the Member States’ responsibility’<sup>12</sup>;
- affirming the ‘continuing sovereignty of the people (...) anchored in the

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9 Ulrike Liebert/Hans-Jörg Trenz, ‘Between norms and practices of the public sphere. Assessing the infrastructures for democracy in Europe’, in Erik O. Eriksen/John Erik Fossum (eds), *Reconstituting Democracy in Europe – Theory in Practice*, RECON Report No 8, ARENA Report 2/09, Oslo (September 2009), 163-196. Available online at: <[http://www.reconproject.eu/projectweb/portalproject/Report8\\_TheoryInPractice.html](http://www.reconproject.eu/projectweb/portalproject/Report8_TheoryInPractice.html)>.

10 My third reading of the GCC Lisbon ruling aims at applying and testing for the EU under Lisbon the propositions for democracy-enhancing multilateral organisations; see Robert O. Keohane/Stephen Macedo/Andrew Moravcsik, ‘Democracy-Enhancing Multilateralism’, *International Organization* 63 (2009), 1-31.

11 GCC, para 334.

12 GCC, para 301.

Member States'<sup>13</sup> and 'contained in the last instance in the German Constitution'<sup>14</sup>, it conditions the further expansion of integration on the 'principle of democracy', that is a 'fundamental right for a democratically elected representative who has still something to decide'<sup>15</sup>;

- claiming for itself the final decision competence, the GCC defines its role as that of a 'last resort' in exceptional situations,<sup>16</sup> that is in cases where 'it is for the Federal Republic of Germany due to its responsibility for integration, to work towards a change, and if the worst comes to the worst, even to refuse to further participate in the European Union'.<sup>17</sup>

In sum, the GCC strongly affirms the principle of democracy as it is established by the Basic Law and protected by its 'eternity clause'.<sup>18</sup> Moreover, it attaches it to the sovereign people, defined by 'the citizens' right to determine, in equality and freedom, public authority with regard to persons and subject-matters through elections and other votes'.<sup>19</sup> Arguably, this is a conflation of the principle of democracy with particular institutional forms, and with important implications: It risks obscuring needs for enhancing existing, as well as possibilities for re-configuring new forms of democracy. In fact, by fusing the democratic principle with the existing institutional form of electoral democracy, majority rule and parliamentary government the GCC calls for safeguarding the institutional status quo. Notably, the GCC does not address the more structural deficits of domestic-party parliamentary processes regarding European political representation and participation, although it mandates new legislation for the Lisbon Treaty ratification, aimed at strengthening the German Parliament and, in particular, the opposition. Concerns for the disconnection of domestic democratic politics from supranational decision-making are limited to legislation, while epistemological, political and other constraints are ignored. The question is whether cherishing the established forms of democratic legitimisation within the domestic realm has also prevented the GCC from endorsing supranational modes of institutionalising democracy.

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13 GCC, para 334.

14 GCC, para 340.

15 GCC, paras 178, 181.

16 GCC, paras 240, 245.

17 GCC, para 264.

18 Art. 79, Abs 3.

19 GCC, para 211b.

### **3. Endorsing Cautiously a Supranational Democratic Union**

The Lisbon judgement, although foremost caring for the constitutional identity of the German *Grundgesetz*, also endorses the Lisbon Treaty's 'Provisions on Democratic Principles', as concerns the supranational level. Its support rests on the newly introduced principle of 'Europarechtsfreundlichkeit' (European-law friendliness) to which the Basic Law as well as all constitutional powers of the FRG are committed and which requires them to 'participate in the development of a democratic, social and federal European Union'.<sup>20</sup> However, the CGG cautions against over-interpreting the Lisbon Treaty as a trigger for effectively transforming the EU into a supranational democratic federal state.

In formal constitutional terms, the Treaty of Lisbon introduces elements of supranational statehood:<sup>21</sup> First, from state symbols that are recognised by a large number of member states, to the widening of Council majority decision-making and to European Parliamentary co-decision-making becoming the rule, the institutional set-up of the Union becomes more state-like than before. Furthermore, although 'citizenship of the Union' is conceived as 'additional to national citizenship (Art. 8), citizens are acknowledged as being 'directly represented at Union level in the European Parliament' and, thus, as the constituency of the latter (Art. 8A, 2). Moreover, the preamble of the Treaty as well as the Charter of Fundamental Rights outline the values on which the constitutional order of the EU rests. Finally, although the Lisbon Treaty does not establish the principle of primacy of EU law, it includes a '17. Declaration con-

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20 The German Basic Law, Article 23 [European Union – Protection of basic rights – Principle of subsidiarity] establishes: (1) With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the *Bundesrat*.

21 Normatively speaking, a democratic European federal state would be expected to rest on a) a unitary and state-like entity at the Union level similar to democratic states at the national level; b) a notion of democratic legitimacy of the multilevel EU polity that is rooted primarily in the constituencies of the supranational institutions and secondarily in those of the member states; c) a European constitutional democratic order based on shared cultural and social norms that serve to avoid or regulate conflict; d) a process of European constitution-building where EU law enjoys primacy over national constitutional laws that are required to change, for adapting to EU primary law; see Erik O. Eriksen/John E. Fossum, 'Europe's challenge. Reconstituting Europe or reconstituting democracy', in Eriksen/Fossum (eds), RECON. Theory in Practice, RECON Report No 8, ARENA Report 2/09, Oslo (September 2009).

cerning primacy' that describes the primacy of EU law as a matter of fact, or by convention.

Reading the German Lisbon judgement through the lens of a model of the federal democratic state, we find that the GCC in principle supports it, albeit with contradictions and reservations, as regards its feasibility, and with some caveats, regarding the requirements for legitimating this model:

- In principle, sovereignty for the GCC does not mean per se that a number of sovereign powers 'must remain in the hands of the state', but that these may comprise also a political union: 'Political union means the joint exercise of public authority, including the legislative authority, which even reaches into the traditional core areas of the state's area of competence.'<sup>22</sup> However, in the next paragraph, the GCC defines the scope of material areas that Member States need for retaining 'sufficient space for the political formation of the economic, cultural and social circumstances of life', namely state citizenship, state monopoly of violence, fiscal decisions, criminal law, culture and education, freedom of opinion, press, assembly, religion and social welfare.<sup>23</sup>
- As regards conditions for supranational democratic legitimacy, the Lisbon ruling is not without tensions, either. On the one hand, it recognizes Union citizenship as a constituency of the EU, affirming that the Lisbon Treaty changes the EP's composition so that it will no longer consist of 'representatives of the people of the States brought together in the Community' but of 'representatives of the "Union's citizens"'.<sup>24</sup> It further acknowledges that 'the citizens of the Union are granted a right to participate in the democratic life of the Union (Article 10.3, Article 11.1 TEU-Lisbon), which emphasises a necessary structural connection between the civic polity and public authority'.<sup>25</sup>
- However, on the other hand, the current practices of the EP do not live up to normative requirements.<sup>26</sup> To European citizens, the status of legitimating subjects is negated,<sup>27</sup> since voting rules do not comply with 'the democratic precept of electoral equality' and majority rule, neither in the Council nor in the EP.<sup>28</sup> Neither do the calls by the Treaty of Lisbon for

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22 GCC, para 248.

23 GCC, para 249.

24 GCC, para 42.

25 GCC, para 348.

26 GCC, paras 271, 276, 295.

27 GCC, para 347.

28 GCC, paras 292, 294.

participatory democracy suffice: 'If such ... calls are ... converted into normative statements, which is partly done by the Treaty of Lisbon, without this being connected with an elaboration of the institutions that takes due account of equality, they are not suited to introduce a fundamentally new model on the level of the law.'<sup>29</sup>

- Finally, the transformation of the EU into a federal democratic state would require constitutional revisions of the German Basic Law. The GCC is ready to acknowledge the existence of a functional constitution at the Union level<sup>30</sup> as well as the primacy of EU law over national primary law, but requires from a state-like development more: 'To the extent that the development of the European Union in analogy to a state would be continued on the basis of the Treaty of Lisbon, which is open to development in this context, this would be in contradiction to constitutional foundations. Such a step, however, has not been made by the Treaty of Lisbon'.<sup>31</sup>

In sum, against much of the rhetoric that had accompanied the post-Laeken process, the GCC's skeptical reasoning cautions both European federalists as well as anti-federalists. Thus, although the German judges do not exclude the possibility of a European federal democratic state in principle, in practice they underscore its current shortcomings. While cherishing national democratic sovereignty in a Union of states, they also acknowledge the evolving practices of transnational, multi-lateral and multilevel governance. But they also make clear, which preconditions they expect a 'Federal Republic of Europe'<sup>32</sup> to meet if this is to claim democratic legitimacy.

#### **4. Embracing a Democracy-Enhancing Association of States, Courts and Peoples**

My final reading of the Lisbon ruling addresses the issue of what preconditions democratic legitimacy in the context of the EU requires when looked at neither exclusively through the lens of national democratic sovereignties nor solely through those of a supranational democratic republic. Instead, I assume that peoples' democratic sovereignties and the defence of the European Union on democratic grounds need to be reconciled. Instead of exacerbated conflict and

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29 GCC, para 295.

30 GCC, para 231.

31 GCC, para 376.

32 See Stefan Collignon, *Bundesrepublik Europa? Die demokratische Herausforderung und Europas Krise*, Berlin 2008.

competition, the complementarities between both are what counts. Democratic procedures that are taken for granted at the domestic state level – such as majority rule and electoral equality – and projected onto the supranational level will not necessarily do the job, since these might have adverse effects on the quality of domestic democracies. Alternative standards for normatively assessing European constitutional developments are needed. To legitimate the Union in the terms of democracy and in a federal system, its consequences for the democratic quality of its component parts must take centre stage.

Adopting the angle of the EU as a ‘democracy-enhancing’ supranational organisation under the Lisbon Treaty, I propose assessing its implications for the quality of domestic democracies, measured by four standards:<sup>33</sup>

- Whether supranational organisations will serve the protection of individual and human rights in the member states by adopting provisions such as, for instance, the EU Charter of Fundamental Rights;
- To what extent supranational regimes will restrict the power of special-interest factions that may have gone unchecked within member states, by establishing supranational judicial bodies or Constitutional Courts, such as the ECJ, or by supranational transparency, accountability, representation and participation regimes, such as the Social Dialogue, or the Civic Dialogue in the EU;
- How supranational organisations will enhance the quality of democratic deliberation within the member states on EU policy making, for instance by empowering national parliaments for subsidiarity control, or by enhancing interparliamentary cooperation, such as, for instance, COSAC; or by introducing a citizens’ legislative initiative;
- Whether supranational organisations will create public goods of general interest by expanding effective problem solving to areas where nation states have failed, such as for instance to problems of international financial crisis management, global climate change or energy security policies.

If we assess the Lisbon ruling through the lens of a (domestic) democracy - enhancing supranational Union, the GCC can be credited for having contributed towards this framework as well as standing in its way. On the one hand, the democratic value added by European integration under Lisbon is reflected by the GCC’s reasoning in a number of points:

- Fundamentally, the Maastricht ruling’s concept of *Verbund* has been fur-

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33 I am borrowing here from ‘democracy-enhancing multilateralism’, coined by Keohane, Macedo, and Moravcsik, see note 10 above.

ther developed, defined now as ‘a close long-term association of states which remain sovereign, ... and in which the peoples of their Member states ... remain the subjects of democratic legitimisation’.<sup>34</sup> It describes the EU as a complex of sovereign national states that are mutually committed to openness, integration and international law.

- Moreover, democratic legitimisation goes beyond electoral democracy, it requires also at the domestic level a viable public sphere: ‘...democracy first and foremost lives on, and in, a viable public opinion that concentrates on central acts of determination of political direction and the periodic allocation of highest-ranking political offices in the competition .... Only this public opinion makes visible the alternatives for elections and other votes’<sup>35</sup>.
- In addition, the GCC acknowledges the ‘sui-generis nature’ of the EU, depicting it as a ‘system of federal and supranational intertwining of power’,<sup>36</sup> and concluding that ‘the democracy of the European Union cannot, and need not, be shaped in analogy to that of a state. Instead, the European Union is free to look for its own ways of democratic supplementation by means of additional, novel forms of transparent or participative political decision-making’.<sup>37</sup> For instance, the GCC sees citizens’ consultation and participation by the EU as complementary, according to ‘the precept of providing, in a suitable manner, the citizens of the Union and “representative” associations with the possibility of making their views heard, as well as the elements of associative and direct democracy’; and it admits that calls for a ‘Citizens’ Europe’ or the ‘strengthening of the European Parliament’ could ‘politically convey the European level’ in the domestic realm.

On the other hand, the GCC keeps a number of obstacles in the way of a full-fledged normative template for assessing EU treaty reforms by the standards of a ‘democracy-enhancing’ supranational organisation. The Lisbon ruling does not fully escape the grip of traditional dualisms, conducive to unnecessary tensions, if not contradictions. Conflicts loom large, as far as the dichotomous construction of national state sovereignty vs. supranational statehood is maintained. These tensions emerge from binary thinking, juxtaposing national and supranational statehood (see above, 3.). By contrast, making a case for complementarities, the GCC proclaims that: ‘Neither the additional rights of par-

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34 GCC, para 229.

35 GCC, para 250.

36 GCC, para 246.

37 GCC, para, 272.



ticipation, which are strongly interlocked as regards the effects of their many levels of action and in view of the large number of national parliaments, nor rights of petition which are associative and have a direct effect vis-à-vis the Commission are suited to replace the majority rule which is established by an election. They are intended to, and indeed can, ultimately increase the level of legitimisation all the same under the conditions of a *Staatenverbund* with restricted tasks'.<sup>38</sup>

## 5. Synthesis and Conclusions

The question that has been explored here is whether and how the German Lisbon judgment conveys a coherent message about a democratically appropriate European order and how this resonates with the current intellectual and political debate. Karlsruhe can be commended for placing the democratic deficits of European integration centre stage, for protecting the German constitutional identity against 'excessive federalisation' and, moreover, for calling the *Bundestag* and *Bundesrat* to effectively assume their democratic '*Integrationsverantwortung*'. Yet, an exclusively 'democratic sovereignist' reading misses the specific 'Europe-friendliness' of the messages conveyed by the GCC's Lisbon ruling. In particular, the GCC's insistence on high thresholds for a European democratic federal state is not necessarily reluctance *tout court*, but should be read as the claim that a 'Constitutional moment' and the revision of the Basic Law are required at the threshold from the status quo of a confederal union to 'supranational statehood'.

Summarising my account, I would hardly praise the Federal Court by virtue of its most recent contribution to the international, European and German constitutional conversation about the question of democracy for offering a coherent and authoritative message or clear-cut model of European democracy, capable of unambiguously informing political practices, and instructing the general public. Instead of proposing a sole device for how to (re-)build democracy in the EU polity, the Lisbon judgement leaves room for tensions between contrasting ideas. I have proposed a reading of the judgement that goes beyond tensions and conflicting tendencies between positions of different persuasions in the Court's reasoning. In particular, I have pointed to some more carefully considered pronouncements with a potential for guiding future developments towards a (domestic) democracy -enhancing European Union. In this sense, I have sought to draw a more nuanced account of the German Lisbon judgement compared to critical legal interpretations or political contestations that have

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38 GCC, para 294.

taken issue with it.<sup>39</sup> Overall, the Lisbon reasoning can be criticised for not yet escaping tensions between dichotomous normative schemes that are in the way of developing the democracy-enhancing potential of European ‘multilevel constitutionalism’<sup>40</sup>, or that inhibit a more full-fledged European association of constitutional courts.<sup>41</sup> But the GCC should not be accused for lacking insights into the necessity, nor suffering from a poverty of imagination regarding the upgrading of the quality of domestic democracy through supranational constitutional reform. Thus, the *Staatenverbund* that was conceived by the Maastricht ruling has been developed by the Lisbon judgement to comprise an association of democratic peoples. If in this complex polity, the sovereignties of the diverse parts would hold together by the principles of democracy-enhancing Union, they would constitute a European demoi-cracy.<sup>42</sup>

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39 See note 7 and note 8 above.

40 Ingolf Pernice, *The Treaty of Lisbon: Multilevel Constitutionalism in Action*, WHI, Berlin (February 2009).

41 Andreas Voßkuhle, GCC Vicepresident, ‘Der europäische Verfassungsgerichtsverbund’, talk given at the Bavarian regional representation at the EU, Brussels (3.11.2009)

42 For the idea of a European demoi-cracy, see Kalypso Nicolaidis, ‘We the peoples of Europe’, *Foreign Affairs* (2004), and James Bohman, *Democracy Across Borders. From Demos to Demoi*, Cambridge MA 2007.



## After the Lisbon Ruling: Where Is Social Democracy?

*Kolja Möller*

In the German public sphere, the constitutional court is not only regarded as ‘*bouche de la loi*’ (Montesquieu) but as an agency of veridiction which is perceived to be highly committed to the general public interest. It seems to stand above political conflicts and assumes a truth-telling role.<sup>1</sup> Therefore it is not entirely surprising that political elites welcomed the Lisbon ruling of the German Constitutional Court (GCC): given such circumstances, criticisms of the GCC judgments and the questioning of their moral authority do not appear to indicate a promising move. What is astonishing about the GCC ruling and the German debate on the Lisbon treaty is that, seemingly, ‘social democracy’ is not given due recognition: while the GCC draws on a nation-stated fixated and statist conception of democracy, parts of the German progressive camp echo this approach to European integration and reside in a defensive attitude towards European solidarity and democracy. Not the least, this defensive attitude is inspired by a critical view on the recent judgments of the ECJ on *Laval*, *Viking* and *Rüffert* and the market-liberal constitutionalism which emerges on the European level.<sup>2</sup> However, it’s questionable if such a new realism on the dominance of market liberal constitutionalism must obligatorily lead to a praise of the GCC judgment or if the GCC judgment rather implies obstacles to the reconstruction of solidarity and democracy in Europe. In the following, it is illustrated that the conception of democracy highlighted by the GCC strongly contrasts with the idea of ‘social democracy’ which played an important role within progressive German constitutional discourse since World War II. Thus it seems to be problematic to interpret the GCC judgment in terms of a ‘democratizing’ verdict. Most prominently, it was the political and legal scientist Wolfgang Abendroth who interpreted Art. 20 and Art. 28 of the German Basic

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- 1 See for a critical view on the authority of the GCC, Ingeborg Maus, *Zur Aufklärung der Demokratietheorie. Rechts- und demokratietheoretische Überlegungen im Anschluss an Kant*, Frankfurt am Main 1992, 60. I borrow the idea that political institutions entail mechanisms of veridiction and politics of truth from the late Michel Foucault. See his recently published lectures, *Le gouvernement de soi et des autres. Cours au Collège de France 1982-1983*, Paris 2008.
  - 2 For a genealogy, see Sonja Buckel/Lukas Oberndorfer, ‘Die lange Inkubationszeit des Wettbewerbs der Rechtsordnungen – Eine Genealogie der Rechtsfälle *Viking/Laval/Rüffert/Luxemburg* aus der Perspektive einer materialistischen Europarechtstheorie’, in Andreas Fischer-Lescano/Florian Rödl/Christoph Schmid (eds), *Europäische Gesellschaftsverfassung. Zur Konstitutionalisierung sozialer Demokratie in Europa*. Schriftenreihe des Zentrums für Europäische Rechtspolitik, Bd. 53, Baden-Baden 2009.

Law (the *demokratische und soziale Rechtsstaat*) as a principle that broadens scope for a not merely political but also ‘social’ democracy, extending co-determination to the sphere of economy and civil society (1). The conception of social democracy attempts to put the whole social and economic order at the disposal of democratic self-rule. Acknowledging the ‘democratic deficit’ of the European Union and the growing social interdependencies on the transnational level, it seems to be an interesting project to re-conceptualize this strand of constitutional discourse.<sup>3</sup> Contrary to the approach of social democracy, the GCC defends a narrow and conservative interpretation of the German Basic Law mirroring Ernst Forsthoff’s claim of legitimacy through a *Staatswillensbildungsprozess* (2.). From a viewpoint of social democracy both – the emerging market liberal constitutionalism within the EU as well as the GCC judgment – are deficient and somehow intertwined: while market-liberal constitutionalism<sup>4</sup> rejects all attempts to establish a European social model, the GCC declares the Europeanization of democracy, budget policies and tax policies to be incompatible with the German Basic Law.<sup>5</sup> Hence it is crucial to search for pathways beyond this ordoliberal amalgam of free-market capitalism and nation-state democracy in order to renew the conception of social democracy on the European level (3.).

## 1. Social Democracy: The Legacy of Progressive Constitutional Discourse

In German constitutional discourse, one can easily identify a strand of reasoning which originated from the debates in the Weimar Republic and made its way to the foundational phase of the Basic Law after World War II. Political and legal scientists such as Herrmann Heller, Franz L. Neumann and Otto Kirchheimer challenged the authoritarian *Staatsrechtslehre* by tracing the interdependencies

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3 See Oliver Eberl, ‘Soziale Demokratie in Europa zwischen Konstitutionalismus und Etatismus’, in Andreas Fischer-Lescano/Florian Rödl/Christoph Schmid (eds), *Europäische Gesellschaftsverfassung. Zur Konstitutionalisierung sozialer Demokratie in Europa*. Schriftenreihe des Zentrums für Europäische Rechtspolitik, Bd. 53, Baden-Baden 2009, 205-218.

4 Stephen Gill, ‘European governance and new constitutionalism: Economic and monetary union and alternatives to disciplinary neoliberalism in Europe’, in *New political economy* 3 (1) (1998), 5-22.

5 GCC, para 249: ‘Essential areas of democratic formative action comprise, inter alia, citizenship, the civil and the military monopoly on the use of force, revenue and expenditure including external financing and all elements of encroachment that are decisive for the realisation of fundamental rights (...).’

of political, social and legal domination.<sup>6</sup> Although all three came to different conclusions regarding the legitimacy of the Weimarer Republik's constitution, they shared a particular perspective on constitutionalism. According to them, constitutional discourse can only be elucidated when the 'social substrate' of legal orders is addressed.<sup>7</sup> In modern capitalist societies social, political and legal domination are interlinked phenomena which cannot be isolated from each other. Furthermore, political institutions are deeply over-determined by economic power relations and often overwhelmed by powerful actors.<sup>8</sup>

In the foundational phase of the BRD, Wolfgang Abendroth refined the progressive constitutional discourse and proposed an interpretation of the German Basic Law in the light of 'social democracy'.<sup>9</sup> In his opinion, the definition of Germany as *sozialer and demokratischer Bundesstaat*, as provided under Article 20 of the German Basic Law, and the formula *demokratischer und sozialer Rechtsstaat*, as embodied within Article 28, should be seen as a commitment to a conception of democratic self-rule that represents more than just a narrow rule-of-law principle and a statal democracy.<sup>10</sup> First, he departs from the fact that modern societies are coined by a class divide rooted in the capitalist mode of production. The modern nation-state and its political and administrative institutions tend to be a formative aspect of capitalist economies because they provide the necessary legal framework for bourgeois rule. Obviously, Abendroth assumes a far-reaching heterogeneity among different social classes in modern societies which directly affects the legal and political sphere. Modern society is 'grounded on capitalist relations of production' and therefore remains an 'an-

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6 See Franz L. Neumann, 'Der Funktionswandel des Gesetzes im Recht der bürgerlichen Gesellschaft (1937)', in Neumann, *Demokratischer und autoritärer Staat – Beiträge zur Soziologie der Politik*, Frankfurt am Main 1967, 7-57; Otto Kirchheimer, 'Weimar – und was dann? Analyse einer Verfassung (1930)', in Kirchheimer, *Politik und Verfassung*, Frankfurt am Main 1964, 9-56; H. Heller, *Staatslehre* (1934), 6. Auflage, Tübingen 1983.

7 Franz L. Neumann, *Die Herrschaft des Gesetzes* (1936), Frankfurt am Main 1980, 33.

8 One should be cautious to consider the fundamental tension between political democracy and social class relations only as a critical-theory issue. Tellingly the republican tradition also deals with the relation of power and political self-determination. For example, Niccolò Machiavelli showed in his famous 'il principe' how social power relations affect political institutions and set in motion a constitutive split between the 'grandi' and the 'populo'. Niccolò Machiavelli, *Il principe* (1513), Chapter IX; cf. Niccolò Machiavelli, *Der Fürst*, Leipzig 1986, 95 ff.

9 Most prominently, Wolfgang Abendroth, 'Zum Begriff des demokratischen und sozialen Rechtsstaates im Grundgesetz der Bundesrepublik Deutschland' (1954), in *Gesammelte Schriften Band 2*, Hannover 2008, 338-357.

10 Ibidem, 339 ff.

tagonistic class society'.<sup>11</sup> But as he introduces the mutual relegation of political institutions and class structure, Abendroth progresses beyond a functionalistic notion of political institutions. According to him, the political and legal framework of modern democracies is a hard-fought area which is sensitive to social struggles.<sup>12</sup> Most notably, the labour movement imposes counter-powers to bourgeois rule and gains achievements while referring to the democratic principle and extending it to the economic and social sphere.

*Second*, Abendroth is sceptical about narrow political democracy which restricts democratic self-determination to institutions of the political system. He assumes that under conditions of severe social inequality and recurring economic crisis, parts of the ruling class often tend to prefer authoritarian and anti-democratic ways of dealing with the conflictual basis of capitalist societies: 'Either formal democracy of statal institutions is extended to a social democracy (...) or the economic power holders of particular interests within society take off the democratic form of political organization (...)'.<sup>13</sup> We should not forget that Abendroth developed his conception of 'social' democracy after the rise of fascism in Germany. He qualifies fascism to be driven by certain factions of the ruling class and the severe concentration of economic power in the hands of a few. According to him (and the mainstream post-war political discourse in Germany), political democracy in capitalist societies always faces the threat of being suspended through anti-liberal parts of the ruling class and/or *coup d'état*. This is the point where the conception of social democracy comes into play. The extension of democracy to the social and economic sphere is crucial: On the one hand, political democracy can only be consolidated if there's a constitutional acknowledgement of the labour movement and its counter-power which hinders the authoritarian factions of the ruling class from suspending political democracy and the rule of law. Otherwise, political democracy will always be susceptible to be transformed into an authoritarian state. On the other hand, the scope for the extension of democracy to the social and economic sphere, as provided by the Basic Law, places the 'social and economic order at the disposition of democratic will-formation of society'.<sup>14</sup> Following Abendroth, the Basic Law delivers a framework where the democratic (and therefore peaceful) transformation of society and the economic order

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11 Wolfgang Abendroth, 'Die politische Wissenschaft unter dem besonderen Gesichtspunkt der Staatslehre' (1952), in *Gesammelte Schriften Band 2*, Hannover 2008, 216-220, 217.

12 Abendroth, note 9 above, 349.

13 Wolfgang Abendroth, 'Funktion der Gewerkschaften in der westdeutschen Demokratie' (1952), in *Gesammelte Schriften Band 2*, 216-230, 222.

14 Abendroth, note 9 above, 346.

in the direction of economic democracy is at least conceivable.

*Third*, Abendroth interprets the Basic Law not as a divine and everlasting *Werteordnung*, rather he considers it to be a compromise between social classes expressing the balance of social forces in post-war Germany: ‘It’s certain that the legal principle of *demokratischer und sozialer Rechtsstaat* was formulated on the basis of a compromise between diverging political and social forces.’<sup>15</sup> Referring to the constitutional principle of *sozialer and demokratischer Rechtsstaat*, Abendroth reveals that the Basic Law involves the labour movement in the constitution and paves the way for co-determination and a democratic transformation of society – most prominently the capitalist economy. Having these aspects in mind, the Basic Law appears to be a class compromise and a pathway to ‘proceduralize’ the splits and deep heterogeneity of capitalist societies. Thus the assumption of a shared ‘German political and normative culture’<sup>16</sup> influenced by welfare-state principles which needs to be defended against European law, is questionable. Neither has there always been unanimity about the prominence of the welfare-state principles within German constitutional discourse during the last sixty years, nor is the presumption plausible that social homogeneity would be a necessary prerequisite for constitution making. Otherwise the establishment of Western Europe’s post-war constitutions – all ‘constitutionalizing’ a particular balance of power among different social classes – would have been simply impossible.<sup>17</sup>

## **2. The GCC Ruling: *Staatswillensbildungsprozess* Instead of Social Democracy**

The GCC ruling on the Lisbon Treaty provides a contrasting interpretation of the Basic Law which is similar to that of conservative approaches on law and democracy. It assumes a ‘non-transferable identity of the Constitution (Article 79.3 of the Basic Law), which is not amenable to integration in this respect’<sup>18</sup> expressing shared ‘economic, cultural and social circumstances of life’ as well as ‘previous understanding as regards culture, history and language.’<sup>19</sup>

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15 Abendroth, note 9 above, 354.

16 Fritz W. Scharpf, ‘The Double Asymmetry of European Integration – Or: Why the EU Cannot Be a Social Market Economy’, MPIfG Working Paper 2009/12, 33.

17 See for the severe legal conflicts on the German Welfare State the contributions in Ernst Forsthoff (ed), *Rechtsstaatlichkeit und Sozialstaatlichkeit. Aufsätze und Essays*, Darmstadt 1968.

18 GCC, para 235.

19 GCC, para 249.



Therewith, it interprets the Basic Law as the constitutional framework of a concrete order and a shared culture grounded on ‘the possibility of realising oneself in one’s own cultural area’<sup>20</sup>. This is accompanied by a restrictive and state-centred interpretation of the democracy principle which restricts democratic self-determination to the national ‘primary area’.<sup>21</sup> Following the GCC’s interpretation, the ‘election of bodies’, most notably the national elections, ‘realizes the self-determination of the people’.<sup>22</sup> Notwithstanding the emergence of democratic practices on the European level, the GCC refers to the unequal representation of votes as a means of presenting the European Parliament as an institution which is not relevant to democratic legitimacy within Europe.<sup>23</sup> Obviously, a particular tension exists in GCC’s argument evolving around the relation between concrete order and the narrow and state-centred conception of political democracy. While the GCC insinuates that the Basic Law should be seen as expressing a (more or less homogenous) cultural and political identity which is undermined by European Law and supranationalism, it curtails the process of democratic self-determination in a formalistic manner to the general parliamentary elections.<sup>24</sup>

Interestingly, this particular tension can also be found in the works of Abendroth’s famous antagonist in the post-war period, Ernst Forsthoff.<sup>25</sup> A follower of Carl Schmitt in many respects, Forsthoff conceives democracy as *Staatswillensbildungsprozess*<sup>26</sup> which includes both: the commitment to a commonwealth which should be secured by the state, as well as the restriction of democracy to parliamentary elections and a negative, almost Lockian notion of freedom. In his late publication *Der Staat der Industriegesellschaft*, Forsthoff warns against the danger of ‘polycracy’ emerging out of post-war

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20 GCC, para 260; see for a critique of the homogeneity aspect in the GCC judgement, Robert Christian van Ooyen, ‘Eine “europafeindliche” Kontinuität? Zum Politikverständnis der Lissabon-Entscheidung des Bundesverfassungsgerichts’, in *Internationale Politik und Gesellschaft* 4 (2009), 26-45.

21 GCC, para 360.

22 GCC, para 268.

23 GCC, para 148.

24 However, the GCC alludes to the possibility that the German people as constituent power adheres to a European Federal state through referendum, paras 217, 228.

25 See his argument against Abendroth and the welfare state as constitutional norm, Ernst Forsthoff, ‘Begriff und Wesen des sozialen Rechtsstaates’ (1954), in Forsthoff (ed), *Rechtsstaatlichkeit und Sozialstaatlichkeit*, Darmstadt 1968, 165-200.

26 Ernst Forsthoff, ‘Verfassungsprobleme des Sozialstaats’ (1954), in Forsthoff (ed), *Rechtsstaatlichkeit und Sozialstaatlichkeit*, Darmstadt 1968, 145-164, 155; see also Ernst Forsthoff, *Der Staat der Industriegesellschaft*, München 1971, 122.

corporatism and democratic movements.<sup>27</sup> Not the ‘power play of industrial society’ among different social and political forces,<sup>28</sup> but the state appears to be the preserver of common wealth through its execution of appropriate decisions. As ‘*Hüter der Ordnung*’ Forsthoff locates the state beyond the social polycracy preserving the concrete social order of the BRD against attempts to change it.<sup>29</sup> Contrary to this substantive argument, Forsthoff insisted in the controversy with Abendroth on the welfare state that the German Basic Law only entails negative freedom and formal legitimacy through parliamentary elections apart from a ‘specific social content’.<sup>30</sup> This is precisely the reason why Forsthoff rejected Abendroth’s approach of social democracy and contested Abendroth’s claim that the welfare-state principle represents a constitutional norm. Although not citing Forsthoff’s reasoning of *Staatswillensbildungsprozess*, the GCC seems to draw on an almost similar amalgam of substantive constitutional identity and state-centred approach to the democratic principle. Paradigmatically, Forsthoff’s *Staatswillensbildungsprozess* regards the state as the preserver of common wealth deciding in the last instance at the substantive level while the parliamentary prelude should integrate the people. From the perspective of social democracy in the tradition of Abendroth, this ambiguous character of *Staatswillensbildungsprozess* represents a formative aspect of conservative constitutional discourse:<sup>31</sup> by introducing a substantive idea of concrete order and normative culture which is to be secured by the state, it obfuscates the fundamental class divide and heterogeneity which is expressed in the constitution. Moreover, the paradox of this approach resides in the fact that the restriction of democracy to the statal and parliamentary sphere perpetuates the existing social constitution in the sense that it accords primacy to the prevailing forms of domination in society and economy over the attempts to make them available to co-determination.

### **3. Renewing Social Democracy on the European Level**

From the perspective of social democracy, the GCC ruling is lacking in several respects because it mainly dwells on the glory of a national *Staatswillensbildungsprozess*. Furthermore, it declares important policy fields such as tax

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27 Ernst Forsthoff, *Der Staat der Industriegesellschaft*, München 1971, 17 and 119 ff.

28 Ibidem, 27.

29 Ibidem, 43.

30 Ernst Forsthoff, *Begriff und Wesen des sozialen Rechtsstaates* (1954), in Forsthoff (ed), *Rechtsstaatlichkeit und Sozialstaatlichkeit*, Darmstadt 1968, 165-200, 185.

31 See also Hauke Brunkhorst, ‘Der Mythos des existenziellen Staates. Das europäische Kontinuum nationaler und gemeinschaftlicher Gewalten’, in *Leviathan* 4/2008, 490-500.

and budget policies to be tied to the nation-state. In so doing, it creates juridical obstacles to the creation of a European social model and even obstructs 'institutional reforms that widen the channels of democratic influence'.<sup>32</sup> Turning to the recent debates on the GCC judgment, it's astonishing that the standpoint of social democracy and progressive constitutional discourse is articulated neither by political parties nor by civil-society actors or trade unions albeit the ratification of the Lisbon Treaty makes the reconstruction of a progressive constitutional politics on the European level more urgent than ever before.

Above all, there is no need for the camp of social democracy to defend the GCC's amalgam of cultural primary areas and statal democracy. It is misleading to echo the GCC's emphasis on normative and cultural homogeneity as it somehow creeps in the recent debates on the GCC's judgment. Taking into account Abendroth's interpretation of the Basic Law even German society was and still is moulded by deep heterogeneity and class divides. From such a perspective, the European welfare-state tradition appears as the result of social struggles discharging into different constitutional arrangements. Thus, it is problematic to overvalue the 'varieties' of different welfare-state traditions and to deduce from this 'variety-interpretation' the need to defend a social compromise on the national level that has already been revoked by economic and political elites. Admittedly, this vicious circle of market-liberal European integration and nation-state-based constituencies is not easy to challenge. At least, from a standpoint of social democracy two political options emerge:

The first is the pragmatic defence of social achievements at nation-state level. Therefore neither a culturalistic reading of democracy nor a praise of the GCC's judgement is necessary. Such a defence would only result from the incapacity to re-establish any progress on the European level. But having in mind the European market integration and the existing 'constitution' of European society, it seems not to be a sustainable option which engages with the already existing European social constitution.<sup>33</sup> A second option seems to be more promising: It would be to renew social democracy at European level and to explore possibilities for social democracy within European law and the new Lisbon Treaty. We should not forget that the welfare-state tradition was a compromise that resulted from severe social conflicts. Today, renewing social

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32 As Hans-Jürgen Urban, vice-president of the IG Metall, recently postulated: Hans Jürgen Urban, 'Zeit für eine politische Neuorientierung: Die Gewerkschaften und die Hoffnung auf ein soziales Europa', in *Internationale Politik und Gesellschaft* 4 (2009), 11-25, 22.

33 See Andreas Fischer-Lescano/Florian Rödl/Christoph Schmid (eds), *Europäische Gesellschaftsverfassung. Zur Konstitutionalisierung sozialer Demokratie in Europa*. Schriftenreihe des Zentrums für Europäische Rechtspolitik, Bd. 53, Baden-Baden 2009.

democracy means to engage with the real existing social and political framework of the European Union as well as with the re-foundation of the progressive camp on the transnational level. This process is intrinsically relegated to social and political struggles and a democratic alternative to the market-liberal pathway which the EU has taken (and the GCC affirmatively legitimated by rejecting any claims about the ‘social deficit’<sup>34</sup>). Contrary to the GCC’s claim that the ‘principle of democracy’ does not serve ‘to adapt the normative content of its provisions to the respective factual situation of the organisation of political rule’<sup>35</sup>, the re-foundation of social democracy could provide the chance to reveal once more the essence of democracy: to question the existing forms of domination and to make them available to democratic self-determination, or to put it in the words of Wolfgang Abendroth: to transform state and society from a ‘system of domination’ to a ‘system of self-rule’.<sup>36</sup>

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34 GCC, paras 394 ff.

35 GCC, para 267.

36 Wolfgang Abendroth, ‘Die Verwirklichung des Mitbestimmungsrechts’ (1954), in *Gesammelte Schriften Band 2*, Hannover 2008, 358-370, 360.



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